Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Petitioner,

v.

KIMBERLY LAGAYLE McCARTHY,
Respondent.

On Petition For Writ of Certiorari
to the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

1. Whether a suspect in custody, who has previously invoked her Fifth Amendment right to counsel, may reinitiate contact with law enforcement, as contemplated by *Edwards v. Arizona*, 451 U.S. 477 (1981), through an agent acting with actual or apparent authority to do so on her behalf.

2. Whether the Fifth Amendment is implicated when a suspect in custody voluntarily confesses to a non-investigating police officer speaking with the suspect as a representative of the suspect's family, as in *Arizona v. Mauro*, 481 U.S. 520 (1987), and not as an interrogating agent of the State.

3. Whether the public safety exception to the Fifth Amendment described in *New York v. Quarles*, 467 U.S. 649 (1984), applies when a suspect, who has previously invoked her right to counsel, confesses to a police officer attempting to obtain information with which to prevent vigilante action by the suspect's family.

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PETITION FOR WRIT OF CERTIORARI

The Texas Court of Criminal Appeals erroneously held that Respondent Kimberly McCarthy's[1] voluntary confession was taken in violation of her Fifth Amendment right to counsel and reversed her capital murder conviction. The court's decision is in conflict with the Fifth Amendment jurisprudence of this Court, as well as various state courts and United States Courts of Appeal. As a result, the Court should grant this petition to resolve the conflict and address these important and unsettled questions of federal constitutional law.

OPINION BELOW

The Texas Court of Criminal Appeals reversed McCarthy's conviction and sentence on December 12, 2001. *McCarthy v. State*, 65 S.W.3d 47 (Tex. Crim. App. 2001); *see also* Appendix A.

JURISDICTION

The Court of Criminal Appeals denied the State's motion for rehearing in an unpublished order on February 6, 2002. *See* Appendix B. Thus, the State's petition for writ of certiorari is timely filed on or before May 7, 2002. SUP. CT. R. 13.3 (West 2002). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...." U.S. CONST. amend. V.

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[1] Respondent will be referred to as "McCarthy," and Petitioner will be referred to as "the State."

STATEMENT OF THE CASE

I. Facts of the Crime

On Tuesday, July 22, 1997, seventy-one year old Dorothy Booth's bloody corpse was found under her dining room table in Lancaster, Texas, a Dallas suburb. 46 SR 47, 70-71, 86-87.[2] Booth died as a result of five stab wounds to her torso. *Id.* at 92-93, 128-29, 134. She was also missing three teeth due to a brutal blow to the face with a candelabra. *Id.* at 93, 122-23. Booth's purse, her white Mercedes station wagon, her platinum and diamond wedding ring — and the finger on which she wore it — were gone. *Id.* at 49-54, 94, 108. McCarthy was seen driving a white Mercedes station wagon at 7:00 or 8:00 a.m. the same morning. *Id.* at 143-44, 151. McCarthy also pawned a diamond ring similar to Dorothy Booth's on the day of Booth's murder. 47 SR 20-25. On Wednesday, July 23rd, McCarthy used Booth's credit cards to purchase cigarettes, as well as five other items at various stores. 46 SR 180-82, 186, 188; 47 SR 18.

On Thursday, July 24, 1997, Lancaster police officers obtained a warrant and searched McCarthy's house, which was forty-three yards from Booth's home. 47 SR 33-35, 37. There they found a large-bladed kitchen knife in a cabinet above the refrigerator which was stained with Booth's blood. *Id.* at 46-47, 104, 160. Other knives of the same brand were found in McCarthy's kitchen drawers. *Id.* at 48. When McCarthy was arrested later that day, she had in her possession Booth's driver's license and several of her credit cards. *Id.* at 62-63, 65, 68-69.

II. McCarthy's Statement

On July 29th, five days after her arrest, McCarthy gave a statement to Dallas police detective Dwayne Bishop:

> Early Tuesday morning[, July 22nd,] about 1:30 a.m., drugs were delivered to me at my residence by "Kilo" and "J.C.," two guys I met in South Dallas selling

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[2] "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "Tr" refers to the transcript of pleadings and documents filed with the court during trial, preceded by volume number and followed by page numbers.

drugs, about a month or so ago. Both guys stayed at my residence [and] partied with me. After my money [and] the drugs ran out, they asked if I could get some more money. I told them no. They asked me if I knew any of my neighbors I could borrow money from [and] I said no, not at that hour [and] that I had to go to work. At that time they began to be verbally abusive [and] threatening to harm me if I didn't. I called my neighbor "Dorothy Booth." I'm not sure of the time [and] got no answer. I waited a while [and] called back, she answered.[3] "Kilo" told me to hang up [and] I did. He told me to call back [and] ask her to borrow some sugar or milk instead of money over the phone, because they were going to rob her [and] take the car. I called back [and] asked to borrow sugar, she said ok.[4] Kilo [and] J.C. followed me to her house, when she opened the door [and] saw me, to let me in they both pushed the door open [and] knocked her down.[5] I was shoved back outside to her car. The driver side was unlocked [and] I was told to stay there [and] lay down in the front seat.[6] Several minutes later they both came out with her car keys, purse, [and] CD player. Both guys went back into my house [and] came out with a jam box, cordless phone [and] caller ID.[7] They told me to drive to Mi Amore motel on [S]econd [A]venue to make a pick up. I was told to park on the

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[3] Dorothy Booth's caller ID box indicated that she received two anonymous phone calls on July 22nd at 6:19 a.m. and 6:29 a.m. 47 SR 99-101.

[4] Sugar was found scattered on Booth's kitchen floor. 46 SR 83, 90.

[5] Although a window next to the door was broken from the *inside*, there was no sign of forced entry. 46 SR 69, 81-83, 106.

[6] Dorothy Booth always kept her car doors locked. 46 SR 50-51.

[7] Booth's cordless phone remained in her kitchen, along with a caller ID unit. 46 SR 99, 113-15. Another telephone with a built-in answering machine was found unplugged from the wall jack in the living room. *Id.* at 102-03.

> next street over [and] wait for them. After about [three to five] minutes or so I drove off with all the belongings they took [and] went to Fitzhugh to the dope house. No one answered the door so I went to Perry [S]treet dope house. I took everything out of the car [and] went inside to get dope. They didn't have any so "Smiley" said he would go around the corner [and] get me some. I gave him the keys [and] another girl rode with him. They came back [and] the police stopped them in front of the dope house on Perry street. I went to the back of the house [and] waited a few minutes [and] left out the back door to get drugs elsewhere.[8] A few hours later I returned to Perry street dope house [and] "Smiley" was upset that the cops stopped him. He gave me the car keys back. He asked me if the car was stolen [and] I said no. He wanted to rent it out for dope so I did [and] left. After the dope ran out I searched the purse [and] found a diamond ring [and] credit cards. I took the ring to the pawn shop [and] sold it. Later I used the credit card at the grocery store [and] gas station to purchase cigarettes by the carton for resale at the "boot leg" for cash. I went to a friend's house to smoke dope. He sold the caller ID and cordless phone for dope money. The jambox was sold to an individual at the Mexican dude on Fitzhugh & East Grand. I got a ride with a male [and] female. We went to several gas stations [and] she went inside to use the credit cards once or twice.

48 SR 14-21; *see also McCarthy v. State*, 65 S.W.3d at 50 n. 4.

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[8] "Smiley," also known as Harry Wilkins, Jr., confirmed that McCarthy arrived at the Perry Street crack house that morning. 46 SR 142-43, 152. She then gave the keys to the white Mercedes wagon to Wilkins and another woman who drove a few blocks in order to procure crack cocaine for McCarthy. *Id.* at 144, 151-52. Upon their return, the vehicle was stopped by police, and Wilkins indicated that its apparent owner, McCarthy, was inside the house. *Id.* at 144-45, 152; 47 SR 122-24. However, the police officer did not find McCarthy in the house. 46 SR 146, 153; 47 SR 124-25.

III. The Pretrial Suppression Hearing

Prior to trial, McCarthy moved to suppress her confession to Dallas police detective Dwayne Bishop and a hearing was held at which the evidence below was adduced. 1 Tr 13-14; 45 SR 3-98. Based on the testimony of Bishop and Lancaster police detective Patrick Stallings, the trial court admitted McCarthy's statement into evidence over her Fifth Amendment objection. 45 SR 97-98; *see also* 48 SR 13.

Dwayne Bishop visited McCarthy at the Dallas County Jail on the morning of July 29, 1997, five days after the murder. 45 SR 68-69; *see also* 48 SR 9-10. Bishop, who was a non-uniformed detective in the intelligence division of the Dallas Police Department,[9] testified that he did so at the request of McCarthy's husband, Aaron McCarthy. 45 SR 68-69; 48 SR 9-10, 34-35. Mr. McCarthy "had called [on July 28th] and stated his wife had been arrested for some murders and that some other guys had committed it and [Mr. McCarthy and his associates[10]] were going to go out ... and try to find the guys that actually committed these murders."[11] 45 SR 68-69, 73. Mr. McCarthy wanted Bishop to "get the story" because he and members of the New Black Panther Party "were going to go out and kick the doors in of some of these drug houses until they could find these guys that he said was with his wife at the time." *Id.* at 74.

Prior to his visit, Bishop informed the Lancaster Police

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[9] Detective Bishop was not associated with the crimes against persons or homicide divisions, did not work for the Lancaster Police Department, and had no investigative responsibilities in the instant case. 45 SR 73; 48 SR 31, 34.

[10] Aaron McCarthy was the leader of the New Black Panther Party. 45 SR 69. Bishop's division monitored "a lot of their demonstrations and whatnot," and Bishop was personally acquainted with Mr. McCarthy. *Id.* at 74; *see also* 48 SR 10.

[11] During the punishment phase of trial, the State presented DNA and fingerprint evidence proving that McCarthy murdered two other elderly women in 1988. 50 SR 90-163; 51 SR 10-34.

Department that he would be speaking with McCarthy.[12] *Id.* at 74-75. Bishop's stated purpose was to verify the truth of McCarthy's story — "if she wasn't telling the truth, I was going to make sure I go back and tell her husband, you know, this is not the truth, don't be going out there and ransacking, beating up guys just because of some description that you have that's not true" — *not* to obtain a statement from McCarthy.[13] *Id.* at 76-77. Bishop read *Miranda*[14] warnings to McCarthy and explained that he was there at her husband's behest; she then agreed to waive her Fifth Amendment rights and discuss the facts of the case. *Id.* at 70-73, 87; *see also* 48 SR 10-12. However, Bishop soon realized that McCarthy's story was internally inconsistent and used a blank statement form to memorialize McCarthy's statement.[15] *Id.* at 78-79, 82. Bishop later reported back to Mr. McCarthy, as requested. *Id.* at 80.

McCarthy was subsequently convicted of capital murder and sentenced to death. 1 Tr 64, 71-75. On direct appeal to the Court of Criminal Appeals, McCarthy again asserted that her statement was taken in violation of the Fifth Amendment "because the police questioned her without an attorney present after she had unambiguously invoked her right to counsel." *McCarthy v. State*, 65 S.W.3d at 49. Citing the "bright line" rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), prohibiting continued interrogation of a suspect who has invoked the right to counsel, the Texas court reversed the conviction. *McCarthy*, 65

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[12] Patrick Stallings testified that Bishop called him on July 28th and informed him that McCarthy's husband had requested that Bishop speak with McCarthy. 45 SR 91. Stallings provided background information to Bishop and explained that he had initially interviewed McCarthy upon her arrest, that she had invoked her right to counsel, and that he had terminated the interview at that point. *Id.* at 92-95. Bishop testified at trial that he did not recall whether Stallings told him about McCarthy's prior interview. *Id.* at 75.

[13] Bishop testified that he spoke with McCarthy in an interview room at the Dallas County Jail and did not bring any recording device with him. 45 SR 77-78.

[14] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[15] Bishop also testified that the statement forms were "already there" at the Dallas County Jail. 45 SR 77.

S.W.3d at 51.[16] The court held that there was no evidence that McCarthy had consulted with counsel or "affirmatively reinitiated conversations with law enforcement," and noted that "the State does not argue that [McCarthy] waived her right to counsel in either of these modes." *Id.* However, the State's brief on appeal is rife with such arguments. *See, e.g.*, Appendix C at 8 ("Detective Bishop went to see [McCarthy] at the request of her husband, not at the request of [law enforcement]"); *id.* at 10 ("This case is analogous to situations where the accused reinitiates contact with the police, since contact here was reinitiated at the request of [McCarthy]'s husband") (citing *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), and *Edwards*, 451 U.S. at 484-85); Appendix C at 11 ("A suspect voluntarily confessing to a person who happens to be a police officer but who talks to the suspect on behalf of a family member does not violate the [Fifth Amendment] .... Bishop was trying to learn the truth for [McCarthy]'s husband").

In its petition for rehearing, the State urged the court to reconsider its judgment in light of further conflicting authorities presented herein. *See* Appendix D. Although the Court of Criminal Appeals denied rehearing without comment, *see* Appendix B, the questions presented for review are properly before the Court because the federal question — whether the Fifth Amendment was violated by Detective Bishop's interview with McCarthy and the admission of her custodial statement at trial — has been contentiously litigated at every turn of the proceedings below. *See Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (holding that the Court has clear jurisdiction to consider a constitutional issue raised and contested at every level of the state court system); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899) (holding that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"). The instant petition for certiorari is, thus, ripe for review.

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[16] McCarthy's contemporaneous state habeas corpus action was dismissed without prejudice by the Court of Criminal Appeals following the direct appeal decision, because McCarthy "is no longer subject to a judgment imposing a penalty of death." *Ex parte McCarthy*, No. 50,360-01 (Tex. Crim. App. Mar. 6, 2002) (unpublished order). The trial court had previously entered findings of fact and conclusions of law recommending the denial of habeas relief concerning five claims unrelated to the instant proceeding. *Id.* at 137-53.

SUMMARY OF THE ARGUMENT

The decision of the Court of Criminal Appeals reversing McCarthy's conviction and sentence is in discord with the Fifth Amendment jurisprudence of this Court, as well as other state and federal courts. First, the lower court's application of the "bright line" rule of *Edwards v. Arizona* is at odds with this Court's continuing recognition of a reinitiation exception to *Edwards*. Indeed, the lower court's reversal creates an important and unresolved conflict between at least one federal circuit and other state courts of last resort concerning an "agency reinitiation" exception to *Edwards*. Because McCarthy was approached by a non-investigating police officer at the request of her husband, McCarthy's agent, certiorari should be granted in order to resolve this critical issue.

Second, the state court's opinion clashes with the Court's holding in *Arizona v. Mauro*, 481 U.S. 520 (1987) and numerous state and federal courts, which found that family members may speak with suspects without implicating Fifth Amendment considerations. In this case, because McCarthy was approached by a police officer acting as a family friend, there was no violation of the prophylactic rule of *Edwards*.

Finally, the lower court's failure to apply the public safety exception of *New York v. Quarles*, 467 U.S. 649 (1984) to the facts of McCarthy's case represents an important split with the several circuits which requires this Court's resolution. Consequently, certiorari review is warranted because the decision of the Court of Criminal Appeals is irreconcilable with the well-established Fifth Amendment authorities set forth below.

ARGUMENT

I. The Lower Court's Decision Creates an Unresolved Conflict with the Decisions of Other Courts Regarding the Application of the "Reinitiation Exception" to the Rule in *Edwards v. Arizona*.

The Court of Criminal Appeals reversed McCarthy's conviction because it erroneously believed that McCarthy could not reinitiate contact with law enforcement through an agent after she invoked her

Fifth Amendment right to counsel. In so holding, the state court relied on an overly technical interpretation of the "reinitiation exception" to the rule in *Edwards v. Arizona* and its progeny, and placed itself in conflict with state and federal authority endorsing an "agency reinitiation" exception to *Edwards*. As a result, certiorari review should be granted to resolve this important conflict.

A. The rationale of *Edwards* and its progeny do not support the state court's decision in this case.

In *Edwards*, this Court created a "bright line" rule (and an exception) in order to "lend [] substance" to its holding in *Miranda v. Arizona*:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, *unless the accused himself reinitiates further communication, exchanges, or conversations with the police.*

Edwards, 451 U.S. at 484-85 (footnote omitted, emphasis added).

The facts of *Edwards* illustrate the rationale behind the rule and its exception. The same day Edwards was arrested, he was informed of his *Miranda* rights and questioned about his involvement in a murder. *Id.* at 478. Edwards initially submitted to interrogation, but questioning was ceased when he requested counsel. *Id.* at 479. Early the next morning, Edwards was told that detectives wished to speak with him again. *Id.* Edwards replied that he did not want to talk, but was told that he was required to submit to further questioning. *Id.* Although Edwards was once again given *Miranda* warnings, he proceeded to implicate himself in the murder. *Id.* The Court noted that "had Edwards initiated the meeting," the Fifth Amendment would not render his

confession inadmissible. *Id.* at 485. However, because Edwards was subjected to further custodial interrogation *against his will*, his incriminating statement was excluded. *Id.* at 487. Thus, the focus of *Edwards* was on the overbearing and intimidating tactics of state actors in continuing to interrogate Edwards, despite his unequivocal invocation of his right to counsel and the implied desire to communicate with police through counsel *only*.

In *Arizona v. Roberson*, the Court reiterated that the major purpose of the *Miranda* and *Edwards* rules was "to give concrete constitutional guidelines" that could be applied with "ease and clarity." *Roberson*, 486 U.S. 675, 680 (1988). Thus, the *Miranda* and *Edwards* rules serve to "counteract the inherently compelling pressures of custodial interrogation and to permit a full opportunity to exercise the privilege against self-incrimination." *Id.* at 681 (internal quotations omitted). The Court explained that:

> If a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities behest, *and not at the suspect's own instigation*, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect.

Id. (internal quotations omitted, emphasis added). However, the absence of a "police-dominated atmosphere" necessarily strips the *Miranda/Edwards* rule of its urgency and necessity. *See Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990) (holding that Fifth Amendment is not implicated when suspect in custody converses with someone who the suspect does not know to be a government agent).

In a plurality opinion in *Oregon v. Bradshaw*, the Court had already explained that the *Edwards* rule "was in effect a prophylactic rule, designed to protect an accused in police custody from being *badgered* by police officers in the manner in which the defendant in *Edwards* was." *Bradshaw*, 462 U.S. 1039, 1044 (1983) (emphasis added). In *Bradshaw*, the defendant initially invoked his right to counsel, but then "evinced a willingness and a desire for a generalized discussion about the investigation" by asking, "Well, what is going to

happen to me now?" *Id.* at 1042-43, 1045-46. As a result, a subsequent polygraph examination and confession did not amount to a violation of the *Edwards* rule because the reinitiation exception was applicable.[17] *Id.* at 1042, 1046. Hence, it is without question that a confession is admissible, even when the right to counsel has been invoked, when a suspect reinitiates contact with law enforcement and waives his right to counsel. The reinitiation rebuts the presumption that a subsequent waiver and statement was the result of overwhelming or undue influence by law enforcement officials.

As discussed *supra*, the instant case does not present a situation where McCarthy was forced to speak with Detective Bishop or to waive her right to counsel against her will, under police pressure. Indeed, the second interview and attendant waiver occurred five days after her arrest and original invocation of the right to counsel, which was scrupulously honored, with no intervening contact between McCarthy and law enforcement personnel. Bishop, a non-uniformed officer, was requested to speak with McCarthy not by Dallas or Lancaster police officials, but by McCarthy's husband. Thus, McCarthy's confession does not implicate the Fifth Amendment concerns of *Edwards* and *Roberson* because McCarthy was not badgered into confessing or waiving her Fifth Amendment right to counsel by intrusive or coercive police misconduct. Rather, the instant case falls within the reinitiation exception first recognized in *Edwards* and explained in *Bradshaw*, as demonstrated below.

B. The state court's decision is at odds with the agency reinitiation exception to *Edwards* recognized by other state and federal courts.

The Court of Criminal Appeals decision is also at odds with several courts which have recognized that the reinitiation exception to *Edwards* allows for a reinitiation of contact with law enforcement through a third-party agent. For instance, in *United States v. Gonzalez*, a DEA agent resumed interrogation of a suspect who had previously

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[17] A second, related element of the reinitiation exception is a contemporaneous waiver of the right to counsel. *Id.* at 1044-45. In the instant case, McCarthy voluntarily waived her right to counsel when she spoke with Detective Bishop. 45 SR 70-73, 87; *see also* 48 SR 10-12.

invoked his right to counsel at the behest of the suspect's wife. 183 F.3d 1315, 1323 (11th Cir. 1999), *cert. denied*, 528 U.S. 1144 (2000). The interrogation, conducted without Gonzalez's attorney present, resulted in a confession which was used against him at trial. *Id.* The Eleventh Circuit Court of Appeals upheld the trial court's decision to allow the confession into evidence because "Gonzalez's wife indicated to the police that Gonzalez wished to talk to them." *Id.* at 1324. The court reasoned that, because "the police respected Gonzalez's right to counsel and only went to talk to him after his wife told them that he wanted to talk to them," the policy behind *Edwards* remained intact. *Id.* Gonzalez's wife reinitiated questioning, as contemplated in *Oregon v. Bradshaw*, as his *agent*. *Id.*

The Supreme Court of Georgia has also noted such an exception. In *Harvell v. State*, the defendant invoked his right to counsel and requested to speak with his mother at the same time. ___ S.E.2d ___, No. S02A0421, 2002 WL 549982, * 2 (Ga. Apr. 15, 2002). After speaking with her son, Ms. Harvell informed officers that he wished to make a statement. *Id.* Harvell then gave officers an inculpatory statement. *Id.* Adopting the Eleventh Circuit's agency reinitiation approach in *Gonzalez*, the Georgia court held that Harvell had reinitiated interrogation through an agent — his mother. *Id.* (citing *Gonzalez*, 183 F.3d at 1324).

Finally, the agency reinitiation exception was recognized in a death penalty case as well. In *State v. Van Hook*, decided soon after this Court's opinion in *Roberson*, police terminated the interrogation of the defendant when he requested counsel. 530 N.E.2d 883, 885 (Ohio 1988). Thereafter, Van Hook contacted his mother and told her that he had changed his mind and wanted to make a statement. *Id.* at 885, 887. After Van Hook's mother relayed this information to police, detectives approached Van Hook once again and obtained a confession. *Id.* at 885-87. The Supreme Court of Ohio held that Van Hook reinitiated contact with police through a non-attorney, third-party agent — his mother. *Id.* at 887-88. The court concluded that this agency reinitiation was consistent with the reinitiation exception espoused by this Court in *Edwards* and *Roberson*, and upheld the trial court's decision to admit the statement into evidence. *Id.*

Importantly, the Ohio Court noted that, although there was no

direct evidence that Van Hook's mother had acted as an actual agent for her son (because the trial court erroneously excluded testimony regarding detectives' conversations with the mother), "such content is *inferrable* from the record ...." *Id.* at 887 (emphasis added). The court explained that the record "made [it] clear that Van Hook had called his mother while he was in the custody of the Florida police," that detectives talked to Van Hook's mother *after* Van Hook talked to her and *before* he met with Van Hook, and that detectives "conceived **a belief** that [Van Hook] would *want* to talk to him because of what '[s]he [Van Hook's mother] had told me — .'" *Id.* (emphasis in bold added, emphasis in italics in original).

In the instant case, as in *Van Hook*, there is no direct testimony that McCarthy asked her husband to contact Detective Bishop. Indeed, neither side specifically asked that question of Detective Bishop during trial. Just like in *Van Hook*, however, this Court may infer that McCarthy talked to her husband *before* her husband contacted Detective Bishop because that is *the only way* her husband could have known McCarthy's story that "some other guys" committed the offense. 45 SR 69. At the time McCarthy's husband talked to Detective Bishop, there would not have been any newspaper or television press on this aspect of the case. In her written statement, McCarthy said that two men named Kilo and J.C. delivered drugs to her house at 1:30 a.m., stayed and partied with her until the drugs ran out, then asked her for more money and threatened to harm her if she did not obtain money from her neighbors. 48 SR 15-17. Five days *before* McCarthy gave this statement, McCarthy's husband told Detective Bishop that he and others "were going to go out and kick the doors in of some of these drug houses until they could find these guys that [were] with his wife at the time." 45 SR 74. Thus, there is strong circumstantial evidence that McCarthy told her husband the same story about the two drug dealers before she told Detective Bishop (and put it in her written statement).

Additionally, Detective Bishop's testimony suggests that McCarthy was eager to tell her story. Specifically, Bishop testified, "I wanted to find out what's going on here ... so she explained it." *Id.* at 79. He also testified, "Once she started explaining to me, I thought, well, wait a minute, there is a little bit more to this, and I started making notes as to what she was telling me." *Id.* Moreover, just like in *Van*

Hook. Detective Bishop would have reasonably assumed that McCarthy's husband had her best interests at heart and that McCarthy would *want* to talk to him. Thus, the fact that McCarthy's husband *had* actual authority to act as her agent and reinitiate contact with police can be inferred from both the timing of the husband's request and McCarthy's reaction to Detective Bishop.[18] McCarthy's reaction is tantamount to ratification, as discussed *infra*.

Alternatively, even if McCarthy's husband did not have actual authority to reinitiate contact with law enforcement, he had apparent authority to ask Detective Bishop to visit McCarthy. Under Texas law, apparent authority exists when conduct by the principal leads a reasonable third party to believe that the agent has the authority that he purports to exercise. *Hale v. Cotton Petroleum Corp.*, 796 F.2d 74, 76 (5th Cir. 1986); *see also Suarez v. Jordan*, 35 S.W.3d 268, 273 (Tex. App. – Houston [14th Dist.] 2000, no writ) (holding that apparent authority is determined by looking to the acts of the principal and ascertaining whether those acts would lead a reasonably prudent person using diligence and discretion to suppose the agent had the authority to act on behalf of the principal).

In this case, McCarthy acquiesced in talking to Detective Bishop after he read her the *Miranda* warnings and explained that her husband had sent him. Thus, McCarthy's actions would have led Detective Bishop to reasonably suppose McCarthy's husband had the authority to act on her behalf; therefore, viewed from Detective Bishop's standpoint, McCarthy's husband had apparent authority to ask Bishop to speak to his wife about this case.

In addition to establishing her husband's apparent authority, McCarthy ratified her husband's actions by agreeing to talk to Detective

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[18] "Under the law of agency, a principal may be bound by the acts of an agent only if that agent acted with actual or apparent authority." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 65 n. 21 (1984) (citing RESTATEMENT (SECOND) OF AGENCY § 145, 159 (1958)). Under Texas law, actual authority is created either through words that expressly or directly authorize action, or it may be circumstantially implied from the surrounding facts and circumstances. *Pasant v. Jackson Nat. Life Ins. Co.*, 52 F.3d 94, 97 (5th Cir. 1995); *Wells Fargo Business Credit v. Ben Kozloff, Inc.*, 695 F.2d 940, 944 (5th Cir. 1982).

Bishop, even though she was fully aware of her right to counsel and fully aware that her husband had sent the detective. Section 82 of the Restatement of Agency states, "[r]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." RESTATEMENT (SECOND) OF AGENCY § 82; *see also Household Credit Services, Inc. v. Driscol*, 989 S.W.2d 72, 87 (Tex. App. – El Paso 1998, writ denied) (explaining that the elements of ratification are: approval by act, word, or conduct; with full knowledge of the facts of the earlier act; and with the intention of giving validity to the earlier act). The Restatement of Agency also provides, "[p]ersons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve .... If there was clearly no authorization to do the acts, the acquiescence by the principal indicates an affirmance which normally operates as ratification." RESTATEMENT (SECOND) OF AGENCY § 43.

In this case, ratification occurred when Detective Bishop told McCarthy that her husband had sent him, and McCarthy nonetheless agreed, not only to continue talking to Detective Bishop, but also to give a written statement.[19] Thus, even if this Court concludes that McCarthy's husband was not acting under actual or apparent authority in asking Detective Bishop to speak with his wife, McCarthy ratified her husband's act of sending Detective Bishop when she failed to repudiate it.

Accordingly, although McCarthy initially invoked her right to counsel, she plainly reinitiated contact and interrogation through her husband who acted as her agent. There is extremely strong circumstantial evidence that McCarthy asked her husband to talk to Detective Bishop. Regardless, even if McCarthy did not authorize her

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[19] This ratification is conceptually similar to the evidentiary rule of "adoptive admission." *See* FED. R. EVID. 801(d)(2)(B) (statement is not hearsay if it is offered against a party and is a statement of which the party has manifested his adoption or belief in its truth). As stated above, if McCarthy felt that her husband did not have her best interest at heart, or if she simply did not want to talk to Detective Bishop, one would have expected her to have in some way distanced herself from her husband's apparent authority to act for her in reinitiating contact.

husband to talk to Detective Bishop on her behalf, she clearly acquiesced in talking to Detective Bishop, conveying to him that her husband had apparent authority to act on her behalf, and ratified her husband's actions by talking with the detective even after being completely aware that her husband had sent him. Under any of the above theories, McCarthy and/or her husband caused Detective Bishop to speak with her, and their affirmative acts to bring about communications should not be imputed to the State under any *Miranda* or *Edwards* rationale. Rather, the facts fall squarely within the agency reinitiation exception espoused by the Eleventh Circuit as well as the Supreme Courts of Georgia and Ohio, and certiorari should be granted to resolve the conflicting interpretations of federal constitutional law.

II. In Any Event, the Lower Court's Decision Conflicts with Federal Constitutional Law Regarding Confessions to Family Members.

The decision of the Court of Criminal Appeals is also contrary to this Court's holding in *Arizona v. Mauro* because Detective Bishop's actions were analogous to those of a family member rather than a law enforcement officer. Thus, Detective Bishop did not "reinitiate interrogation" as contemplated by *Edwards v. Arizona*. As a result, the state court's decision is in conflict with the federal constitutional principles set forth by this Court and other state and federal courts, and certiorari should be granted.

In *Arizona v. Mauro*, this Court held that inculpatory statements made by a suspect to his wife in the presence of a police officer did not violate the bright line rule of *Edwards v. Arizona* even though the suspect had previously invoked his right to counsel. *Mauro*, 481 U.S. at 522-23, 530. In so holding, the Court reasoned that Mauro was not interrogated because his incriminating statements were not elicited by police conduct but by his wife. *Id.* at 527. Moreover, the statements were not the result of a ruse or psychological ploy perpetrated to "subjugate the individual to the will of his examiner." *Id.* at 526-29 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980), and *Miranda*, 384 U.S. at 457). Therefore, the prophylactic rule of *Miranda* and *Edwards* was not implicated because the statements were not the result of a police-dominated, coercive environment. *Id.* at 529-30. Much as in *Perkins* and *Bradshaw*, discussed *supra*, the policy underlying the

Edwards rule is not applicable where a defendant is able to act voluntarily and is not subject to the "inherently compelling pressures" of investigative interrogation. *Arizona v. Roberson*, 486 U.S. at 681.

In this case, Detective Bishop acted at the behest and on behalf of McCarthy's husband; thus, he acted more in the capacity of a family member than as an investigating agent of the State. Bishop's actions were wholly prompted by McCarthy's husband's intervention, and his status as an officer merely afforded him access to act on behalf of the family. Therefore, his conversation with McCarthy did not amount to police-initiated interrogation as contemplated by *Miranda* and *Edwards*. Rather, Bishop's conversation with McCarthy is correlative to *Mauro* and its progeny.

Numerous courts have applied *Mauro* under similar circumstances and held that *Edwards* is not implicated when a suspect in custody is questioned or encouraged to confess by a family member. For example, the Seventh Circuit recently applied *Mauro* to a death penalty case in *Whitehead v. Cowan*, 263 F.3d 708 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 927 (Jan. 22, 2002). In *Whitehead*, the court of appeals held that no interrogation occurred where a defendant confessed to his sister-in-law after invoking the right to counsel. *Id.* at 714-15, 717-19. The court reasoned that because a family member's questioning cannot be considered a "compelling influence[]" or "psychological ploy[]," on the part of law enforcement, no interrogation took place, and the rule of *Edwards* did not apply. *Id.* at 719 (quoting *Mauro*, 481 U.S. at 529).

The Eleventh Circuit decided the issue similarly in *United States v. Gaddy*, 894 F.2d 1307 (11th Cir. 1990). There, William Danner and his stepfather, James Gaddy, were separately arrested on different charges. *Id.* at 1309. When Gaddy was confronted by police with the fact that he had been driving a stolen car connected with a missing person, Gaddy said he obtained the vehicle from Danner. *Id.* Gaddy also told officers that Danner's aunt, Janice Hernandez, was a police officer and evidence technician with their department. *Id.* Thereafter, Hernandez was informed of Gaddy's arrest and Danner's possible involvement with the stolen car and missing person. *Id.* Hernandez was later advised that it would be in Danner's best interest to cooperate with the investigation. *Id.* at 1309-10. Although no one asked Hernandez to

speak with her nephew, Danner, she sent a message to Danner to call her, which he did. *Id.* at 1310. Hernandez then urged Danner to reveal any information he had regarding Gaddy's arrest. *Id.* Danner agreed, and Hernandez notified officials that Danner wished to speak. *Id.* Although Danner previously invoked his right to counsel, he provided a detailed statement to the officers implicating himself and Gaddy in the abduction and murder of the missing person. *Id.*

In analyzing Danner's Fifth Amendment claim and finding that no police-initiated interrogation occurred in violation of *Miranda* or *Edwards*, the court of appeals held:

> Hernandez communicated with Danner, not to assist the police department in solving a crime, but to protect her nephew.
>
> ... [Hernandez] acted as a private citizen, a concerned relative attempting to protect Danner from harm. Likewise, by encouraging Danner to tell the police what he knew, she acted as a worried aunt who envisioned the hardship that could befall her nephew if he did not reveal the information he possessed, especially before Gaddy rendered his version of the events to the police. The evidence shows that ... even though she was a police officer, her duties were not investigative in nature. She contacted Danner of her own accord, not at the direction of a superior and not for the benefit of the police department.

Id. at 1311 (footnote omitted).

In the instant case, McCarthy's husband approached Detective Bishop out of concern for both his spouse and his community and asked him to talk to McCarthy. Bishop was not assigned to McCarthy's case, did not investigate the facts of her case, and did not even work for the Lancaster Police Department. 48 SR 31, 34-35. Before talking to McCarthy, Bishop received nothing more than a synopsis of the case from the Lancaster Police Department. 45 SR 84. Although Bishop testified he got permission from his supervisor to visit McCarthy, *id.* at 75, he further testified that his actions were not authorized by his department. *Id.* at 80. Detective Bishop did not meet with McCarthy to

solve the charged offense, but rather to gather facts to pass on to McCarthy's husband. Therefore, as in *Gaddy*, no police-initiated interrogation occurred in this case.

Likewise, *Cook v. State*, 514 S.E.2d 657 (Ga.), *cert. denied*, 528 U.S. 974 (1999), *r'hrg denied*, 528 U.S. 1108 (2000), is instructive. After two murders had gone unsolved for almost two years, Cook became a suspect. *Id.* at 660-61. When a "GBI agent" went to arrest Cook, he could not be found. *Id.* at 661. The agent then asked Cook's father, FBI agent John Cook, for his assistance in locating Cook for questioning about the unsolved murders. *Id.* The father agreed to contact his son, but did not think he was involved in the murders. *Id.* Cook admitted to his father that he had shot the victims in self-defense, but refused to turn himself in. *Id.*

The next day, Cook was arrested for an unrelated offense. *Id.* When Cook was read his *Miranda* warnings, he demanded to see his father and a lawyer. *Id.* at 662. Subsequently, the police allowed the father to speak with Cook, who admitted to committing the murders for no reason. *Id.* Cook's father testified at trial that he "wanted to know what happened" and that he spoke with Cook "mostly as a father" rather than as an FBI agent. *Id.* at 663. Cook's father also testified that he did *not* intend to gather evidence for the State; instead, he wanted "to try to persuade [Cook] to cooperate in hopes of getting a reduced sentence." *Id.* However, Cook's father stated that "he was not going to keep any incriminating evidence to himself and that he had no doubt he would pass on additional information to the investigators." *Id.*

The Georgia Supreme Court held that Cook's father acted as a family member and not as an agent of the state when he met with his son, relying on the following facts: (1) Cook's father was not part of the investigative team; (2) Cook asked to see his father when he requested an attorney; (3) Cook's father was not directed by any law enforcement agent to speak to his son — he made the request on his own initiative; (4) Cook's father's motive in speaking with his son was to urge him to cooperate in the hope of getting a plea bargain; and (5) the interview involved hugging and crying by father and son which is not typical of a police interrogation. *Id.* at 665.

Similarly, in the instant case, Detective Bishop was not part of

the investigative team; he was approached by McCarthy's husband; he was not directed by any law enforcement agent connected with the case to speak to McCarthy; and Bishop's motive in speaking to McCarthy was to do a favor for McCarthy's husband. Thus, as in *Cook*, Detective Bishop acted more in the capacity of a family member than an agent of the State and, therefore, no police-initiated communication implicating *Edwards* occurred. As a result, the state court's decision is in conflict with *Mauro* and various state and federal courts, and certiorari should be granted in order to resolve this conflict.

III. Finally, the Lower Court's Decision Is in Conflict with the Public Safety Exception Recognized by this Court in *New York v. Quarles*.

The lower court also incorrectly decided an important federal question in conflict with this Court's holding in *New York v. Quarles*. In *Quarles*, the Court stated:

> Whatever the motivation of individual officers ... we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

467 U.S. at 656. The Court concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. The Court also believed that this exception would not be difficult to apply, as police officers "can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-59.

Although the issue in *Quarles* was whether *Miranda* prohibited the initial questioning of a suspect without proper warnings, *id.* at 651, its holding is equally applicable in the *Edwards* reinitiation context. As the Court noted, the situation in *Quarles* did not involve compelling police conduct that overcame a suspect's will to resist. *Id.* at 654. As a result, the "concern for public safety must be paramount to" the policy considerations of *Miranda*. *Id.* at 653. In *Edwards v. Arizona*, the Court reasoned that the bright line rule established therein *lent substance*

to *Miranda*. *Edwards*, 451 U.S. at 485. Because both *Edwards* and *Miranda* exist to protect the same interest, there is no reason that *Quarles* should not apply to *Edwards* as well.

Indeed, at least three courts have held that *Quarles* applies to the *Edwards* reinitiation rule. For example, the District of Columbia Court of Appeals applied *Quarles* where a defendant was arrested at his home four days after an attempted robbery and shooting. *Trice v. United States*, 662 A.2d 891, 892 (D.C. 1995). After Trice invoked his right to counsel, a police detective asked him where the gun was, explaining that "[t]here are little kids in the house. I don't want anyone to get hurt." *Id.* at 892-93. The court of appeals held that "certain exigencies require the courts to relax rules that act as prophylactic safeguards of the right against compelled self-incrimination," including "the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel." *Id.* at 895. Thus, *Quarles* applies to *Edwards* "for the straightforward reason that the danger does not abate with *Miranda* warnings and assertions." *Id.*

The Fourth Circuit recognized as much in *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994). The *Mobley* court held that *Quarles* applied to *Edwards*, but found that where the defendant was encountered naked in his home, no "objective danger" existed justifying such an exception. *Id.* at 693. The Ninth Circuit has also reasoned that "[t]he same considerations that allow the police to dispense with providing *Miranda* warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard [of *Edwards*]." *United States v. DeSantis*, 870 F.2d 536, 541 (9th Cir. 1989). In *DeSantis*, however, the court of appeals held that the a suspect's request to retrieve clothes from an adjoining bedroom of his house justified police questioning about a gun due to concerns for the safety of police officers themselves. *Id.* at 537.

A public safety exception to the *Edwards* rule should be invoked in the instant case because Detective Bishop approached McCarthy, in part, as an intelligence officer who was trying to protect the public safety and possibly prevent McCarthy's husband and other New Black Panther Party members from taking the law into their own hands. Detective Bishop testified that McCarthy's husband told him that "they were going to go out and kick the doors in of some of these drug houses until they

could find these guys that he said was [*sic*] with his wife at the time." 45 SR 74. Bishop additionally testified that "if she wasn't telling the truth, I was going to make sure I go back and tell her husband, you know, this is not the truth, don't be going out there and ransacking, beating up guys just because of some description that you have that's not true." *Id.* at 76.

The possibility of vigilante violence directed at members of the community in an attempt to locate individuals known only by their street names — Kilo and J.C. — certainly amounts to an "objective danger" as contemplated by *Quarles*. As a result, the prophylactic policy of *Edwards* preventing further interrogation of McCarthy, who previously invoked her right to counsel, is outweighed by the paramount interest in the public safety. Because Detective Bishop acted, in part, out of concern for the public safety when he went to visit McCarthy, and because these unusual circumstances are not likely to recur regularly, the Court should grant certiorari in order to decide this important issue.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari in order to resolve the important and unresolved conflicts between the decision of the lower court and well-established Fifth Amendment authority to the contrary.

Respectfully submitted,

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APPENDIX A

65 S.W.3d 47

(Cite as: 65 S.W.3d 47)

H

Court of Criminal Appeals of Texas.

Kimberly Lagayle McCARTHY, Appellant,

v.

The STATE of Texas.

No. 73350.

Dec. 12, 2001.

Rehearing Denied Feb. 6, 2002.

Defendant was convicted in the trial court, Dallas County, Webb Biard, J., of capital murder and sentenced to death. On automatic appeal, the Court of Criminal Appeals, Cochran, J., held that: (1) defendant's statement to police officer was inadmissible, and (2) error in admitting statement was not harmless.

Reversed and remanded.

Keller, P.J., filed dissenting opinion, in which Hervey, J., joined.

West Headnotes

[1] **Criminal Law ⇨1130(5)**

110k1130(5) Most Cited Cases

Issue of voluntariness of defendant's confession was not preserved for review, in capital murder prosecution, as issue was inadequately briefed. Rules App.Proc., Rule 38.1.

[2] **Criminal Law ⇨412.2(4)**

110k412.2(4) Most Cited Cases

Defendant's statement to police detective was inadmissible, in capital murder prosecution, where detective approached defendant and initiated further contact with her after she had already invoked her right to counsel with another police officer; there was no evidence that defendant consulted with counsel before detective questioned her, no evidence that defendant herself affirmatively reinitiated conversations with law enforcement, and fact that detective did not know that

defendant had invoked her right to counsel during previous questioning by another officer was irrelevant. U.S.C.A. Const.Amend. 5.

[3] **Criminal Law** ⚿ **412.2(4)**

110k412.2(4) Most Cited Cases

Once a suspect has invoked the right to counsel during questioning by law enforcement, the Fifth Amendment right to counsel has been invoked and all interrogation by the police must cease until counsel is provided or the suspect reinitiates conversation. U.S.C.A. Const.Amend. 5.

[4] **Criminal Law** ⚿ **412.2(4)**

110k412.2(4) Most Cited Cases

Rule that, once a suspect has invoked the right to counsel during questioning by law enforcement, the Fifth Amendment right to counsel has been invoked and all interrogation by the police must cease until counsel is provided or the suspect reinitiates conversation, is a clear, bright line, constitutional mandate. U.S.C.A. Const.Amend. 5.

[5] **Criminal Law** ⚿ **412.2(4)**

110k412.2(4) Most Cited Cases

When a person subjected to custodial interrogation unambiguously invokes the right to counsel, all questioning must cease; interrogation may not be reinitiated by the police at any time or in any manner unless the person has consulted counsel. U.S.C.A. Const.Amend. 5.

[6] **Criminal Law** ⚿ **1169.12**

110k1169.12 Most Cited Cases

Error in admitting defendant's statement to police detective in capital murder prosecution was not harmless; state relied on statement extensively, both during its case-in-chief and during its closing arguments, to establish defendant's guilt of capital murder either as a party or as a conspirator, and to paint defendant as an unrepentant liar and set out her cruel and greedy motive for killing victim, and there was reasonable likelihood that state's use of statement materially affected jury's deliberations. U.S.C.A. Const.Amend. 5; Rules App.Proc., Rule 44.2(a).

[7] **Criminal Law ⇐1169.12**

110k1169.12 Most Cited Cases

In analyzing whether the constitutionally erroneous admission of a defendant's statement was harmless, Court of Criminal Appeals must review whether the admission of defendant's statement contributed to the jury's verdict of guilty, regardless of whether there is evidence independent of the statement that is otherwise sufficient to sustain the jury's verdict of guilt. Rules App.Proc., Rule 44.2(a).

[8] **Criminal Law ⇐1162**

110k1162 Most Cited Cases

Appellate court conducting harmless error analysis of constitutional error should not focus on the propriety of the outcome of the trial. Rules App.Proc., Rule 44.2(a).

[9] **Criminal Law ⇐1162**

110k1162 Most Cited Cases

If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt; reviewing court should calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence. Rules App.Proc., Rule 44.2(a).

***48** Douglas H. Parks, Dallas, for Appellant.

Karen R. Wise, Asst. DA, Dallas, Matthew Paul, State's Atty., Austin, for State.

OPINION

COCHRAN, J., delivered the opinion of the Court in which MEYERS, PRICE, WOMACK, JOHNSON, and HOLCOMB, JJ., joined.

On November 17, 1998, a jury convicted appellant of the capital murder of Dr. Dorothy Booth, an elderly retired professor, a murder which was alleged to have occurred on July 21, 1997. *See* Tex. Penal Code Ann. § 19.03(a)(2). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071 §§ 2(b) and 2(e), the trial judge sentenced appellant to death. *See* Tex.Code Crim. Proc. Ann. Art. 37.071 § 2(g). [FN1] Direct appeal to this Court is ***49** automatic. *See* Article 37.071 § 2(h). Appellant raises nineteen points of error, but does not challenge the sufficiency of the evidence at

either stage of the trial. We will reverse.

> FN1. Unless otherwise indicated, all future references to Articles refer to Code of Criminal Procedure.

I.

[1] Appellant argues in her first point of error that the trial court's admission of her custodial statement violated her right to counsel under the Fifth and Fourteenth Amendments to the United States Constitution. Appellant specifically asserts that the statement was inadmissible because the police questioned her without an attorney present after she had unambiguously invoked her right to counsel. [FN2] We agree.

> FN2. Appellant also contends that the trial court failed to file findings of fact and conclusions of law on the issue of the voluntariness of her confession, which is required by Article 38.22. Appellant failed, however, to explain how the factual record proves that her confession to the police was made involuntarily, failed to present any legal authority to support the argument that her confession was involuntary, and failed to apply the law to the facts to support the conclusion that her confession was involuntary. Therefore, we conclude that the issue of the voluntariness of appellant's confession was inadequately briefed and presents nothing for review. Tex.R.App.P. 38.1. It does not, therefore, justify an order from this Court remanding this cause to the trial court to conduct a hearing into the voluntariness of appellant's confession and ordering the trial court to enter findings of fact and conclusions of law thereto.

The trial court held a hearing on appellant's motion to suppress her statement. At the hearing, the evidence showed that Sergeant Patrick Stallings

of the Lancaster Police Department arrested appellant on July 24, 1997. Stallings stated that after he arrested appellant, he tried to interview her. He testified that "during the interview, [appellant] said she wanted to give a statement, and at the beginning when we started to take the statement, she asked me to write it, then she invoked her right to have an attorney." Stallings stopped the interview at that point. Appellant also told Stallings that "she did not want to talk with us any further." Stallings testified that he could not interview appellant any further because she had asked for an attorney. He did not provide her with an attorney, but he did immediately cease the interview. Appellant was transferred from Lancaster to the Lew Sterrett Justice Center in Dallas.

On July 28, 1997, Detective Dwayne Bishop of the Dallas Police Department telephoned Stallings to inquire about the case. Bishop told Stallings that Aaron McCarthy, appellant's husband, asked Bishop to speak with appellant at the Dallas County Jail. Stallings discussed the facts of the case with Bishop and faxed three pages of related information to Bishop. Stallings testified that, "prior to the time Detective Bishop ever went to see" appellant, Stallings "clearly told [Bishop] that [he] had tried to talk to her, she invoked her right not to talk to [him] and invoked her right to an attorney." It was Stallings' understanding that Bishop would "try to get a statement from her." Bishop testified, however, that Stallings failed to inform him that appellant had invoked her right to counsel.

On July 29, 1997, Bishop visited appellant at the Sterrett Center. Bishop testified that he read appellant her *Miranda* rights. [FN3] According to Bishop, appellant stated that she understood her rights and indicated that she wanted to continue talking without the presence of an attorney. Bishop testified that he did not threaten or coerce appellant or promise her anything in exchange for her statement. The record, ***50** however, does show that Bishop made no attempt to determine if appellant had an attorney so that he could contact that attorney. The record also demonstrates that appellant did not initiate the meeting with

Bishop.

> FN3. *See* *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Appellant argued in support of her pre-trial motion to suppress her custodial statement that:

> The defendant's position, Your Honor, is that she clearly invoked her right to counsel prior to the time she made any statement. Defendant's position is that she clearly invoked her Fifth Amendment privilege and the rights afforded to her under 38.22 of the Texas Code of Criminal Procedure, the rights given to her by Article I, Section 19 and 189 of the Texas Constitution not the make any statement and not to--well, invoke her right to counsel.
>
> We think the evidence is clear that after she invoked those rights, agents of law enforcement approached her and initiated further contact, and as a result of that this statement is produced. We feel that this is a violation of those rights guaranteed to the defendant and we would ask that the statement be quashed.

The State did not respond. The trial court summarily ruled that the statement was admissible. When the State moved to admit appellant's statement into evidence during its case-in-chief at trial, appellant renewed her objection. The trial court stated that its prior ruling stood and admitted the statement. [FN4]

> FN4. Appellant's written statement reads as follows:
>
> Early Tuesday morning about 1:30 a.m., drugs were delivered to me at my residence by "Kilo" and "J.C.", two guys I met in South Dallas selling drugs, about a month or so ago. Both guys stayed at my residence & partied with me. After my money & the drugs ran out, they asked if I could get some more money. I told them no. They asked me if I knew any of my neighbors I could borrow money from & I said no, not at that hour & that I had to go

to work. At that time they began to be verbally abusive & threatening to harm me if I didn't. I called my neighbor "Dorothy Booth". I'm not sure of the time & got no answer. I waited a while & called back, she answered. "Kilo" told me to hang up & I did. He told me to call back & ask her to borrow some sugar or milk instead of money over the phone, because they were going to rob her & take the car. I called back & asked to borrow sugar, she said ok. Kilo & J.C. followed me to her house, when she opened the door & saw me, to let me in they both pushed the door open & knocked her down. I was shoved back outside to her car. The driver side was unlocked & I was told to stay there & lay down in the front seat. Several minutes later they both came out with her car keys, purse, & CD player.

Both guys went back into my house & came out with a jam box, cordless phone & caller ID. They told me to drive to Mi Amore motel on second avenue to make a pick up. I was told to park on the next street over & wait for them. After about 3-5 minutes or so I drove off with all the belongings they took & went to Fitzhugh to the dope house. No one answered the door so I went to Perry street dope house. I took everything out of the car & went inside to get dope. They didn't have any so "Smiley" said he would go around the corner & get me some. I gave him the keys & another girl rode with him. They came back & the police stopped them in front of the dope house on Perry street. I went to the back of the house & waited a few minutes & left out the back door to get drugs elsewhere. A few

hours later I returned to Perry street dope house & "Smiley" was upset that the cops stopped him. He gave me the car keys back. He asked me if the car was stolen & I said no. He wanted to rent it out for dope so I did & left. After the dope ran out I searched the purse & found a diamond ring & credit cards. I took the ring to the pawn shop & sold it. Later I used the credit card at the grocery store & gas station to purchase cigarettes by the carton for resale at the "boot leg" for cash. I went to a friend's house to smoke dope. He sold the caller ID and cordless phone for dope money. The jambox was sold to an individual at the Mexican dude on Fitzhugh & East Grand. I got a ride with a male & female. We went to several gas stations & she went inside to use the credit cards once or twice.

*51 II.

[2] Appellant argues on appeal that her statement was inadmissible because Bishop approached her and initiated further contact after she invoked her right to counsel. She is correct.

[3] Once a suspect has invoked the right to counsel during questioning by law enforcement, the Fifth Amendment right to counsel has been invoked and all interrogation by the police must cease until counsel is provided or the suspect reinitiates conversation. *See* Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Miranda*, 384 U.S. at 474, 86 S.Ct. 1602; Dinkins v. State, 894 S.W.2d 330, 350-51 (Tex.Crim.App.1995).

[4] This is a clear, "bright line" constitutional mandate frequently repeated by the United States Supreme Court. *See* Minnick v. Mississippi, 498 U.S. 146, 150, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (tracing the historical reiterations of the rule and noting that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application").

This bright and unbending rule "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Minnick*, 498 U.S. at 151, 111 S.Ct. 486. [FN5] State courts are not free to deviate from the firm constitutional mandate set out in *Edwards*.

> FN5. The Supreme Court recently declined to modify or jettison the *Miranda* rule, *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In *Dickerson*, Chief Justice Rehnquist, speaking for the Court, rejected the very rule that the State requests us to adopt in this case: that a defendant's custodial statement should be admissible if, under the totality of circumstances, the court finds that the statement was given voluntarily and without mental or physical coercion, regardless of whether the defendant has been given *Miranda* warnings and invoked his right to consult an attorney. *Id.* at 2336.

[5] There is no evidence in this record that appellant consulted with counsel before Detective Bishop questioned her. There is no evidence in this record that appellant herself affirmatively reinitiated conversations with law enforcement. The State does not argue that appellant waived her right to counsel in either of these modes. Instead, the State contends that Bishop did not, in fact, coerce or badger appellant into making a written statement, and therefore, the underlying purpose of the *Edwards* rule was fulfilled. That may be true. However, the *Edwards* rule acts as a "clear and unequivocal" guideline to law enforcement precisely because it is "relatively rigid." *See Arizona v. Roberson*, 486 U.S. 675, 681, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). When a person subjected to custodial interrogation unambiguously invokes the right to counsel, all questioning must cease. Interrogation may not be reinitiated by the police [FN6]

at any time or in any manner unless the person has consulted counsel. *Id.* at 681-82. Period.

> FN6. Of course, if the arrestee reinitiates the conversation, the *Edwards* rule is satisfied.

The State also argues that Detective Bishop did not know that appellant had invoked her right to counsel. Whether or not Stallings informed Bishop of appellant's invocation of her right to counsel is irrelevant because courts impute knowledge of the invocation of any *Miranda* rights to all representatives of the State. *See* **52*Michigan v. Jackson*, 475 U.S. 625, 634, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *Sterling v. State*, 800 S.W.2d 513, 520 (Tex.Crim.App.1990). Moreover, Stallings' sworn testimony revealed that he informed Bishop that appellant invoked her right to counsel and that Stallings ceased his interrogation of appellant after that invocation.

In sum, the *Edwards* rule does not take into account the good intentions of the individual police officer, the lack of official coercion or badgering in the particular case, or the actual voluntariness of a person's custodial statement. *Edwards* represents a bright and firm constitutional rule that applies to all suspects and all law enforcement officers. We hold, therefore, that the trial court erred in admitting appellant's statement into evidence.

III.

[6] We must now determine whether this error harmed appellant. Texas Rule of Appellate Procedure 44.2(a) provides that where, as here, the appellate record in a criminal case reveals constitutional error, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *See* Tex.R.App.P. 44.2(a). We begin by reviewing the trial record to determine how the State used appellant's statement against her.

We first note that the State offered ample evidence of appellant's guilt from sources independent of her statement. Dr. Booth's daughter testified that, six months prior to her death, Dr. Booth told her that

"the black lady that lived across the alley" called her in the middle of the night and asked to borrow money. The victim's caller ID records showed that she received two calls from an anonymous number on July 22, 1997, at 6:19 a.m. and 6:29 a.m. Harry Wilkins, Jr., aka, "Smiley," testified that appellant was driving the victim's white Mercedes Benz station wagon when she met him on the morning of July 22, 1997, to inquire about buying crack cocaine. The State further showed that appellant pawned the victim's diamond ring on July 22, 1997, and that she used the victim's credit cards at several locations on July 23, 1997. When appellant was arrested on July 24, 1997, she attempted to take with her a tote bag containing the victim's driver's license and several of the victim's credit cards. The State's strongest independent evidence of appellant's guilt was produced when the police executed a search warrant at appellant's home on July 24, 1997. Officers found a large knife stained with Dr. Booth's blood in appellant's kitchen cabinet above the refrigerator. The bloody knife matched other knives found in the kitchen drawers of appellant's house.

Nevertheless, the State relied on appellant's statement extensively, both during its case-in-chief and during its closing arguments. Initially, the State used the statement to set up appellant's version of what happened on the early morning of July 21, 1997. The State used the statement to discredit appellant's version of events as compared to the State's principle theory of the case--that appellant acted alone in the murder and robbery of Dorothy Booth. For example, during direct-examination of Bishop, the State asked him if appellant included in her statement a way for the State to further identify "Kilo and J.C." or find them. Bishop responded in the negative, casting doubt on whether "Kilo and J.C." even existed. During its closing argument at guilt/innocence, the State rhetorically asked the jury: if there really were a "Kilo and J.C.," why would they hide the murder weapon in appellant's kitchen cabinet? The State also questioned why "Kilo and J.C." left appellant alone in the victim's car *53 with all of the stolen property while they went inside a crack house to

negotiate the purchase of drugs.

Additionally, the State made significant use of this statement to establish appellant's guilt for the capital murder of Dr. Booth. The State admitted the statement through the testimony of its last witness during its case-in-chief, as the last exhibit placed before the jury for its consideration. The State used the statement during the presentation of its case to prove that appellant knew Dr. Booth and called her on the morning of the offense to make sure Dr. Booth was home and awake. Even though appellant tried to lay blame for the robbery on "Kilo and J.C.," the State used the statement to show that appellant was aware that "Kilo and J.C." planned to rob Dr. Booth. Bishop also testified that appellant never said in her statement that she left, or tried to leave, to call the police during any of the times that "Kilo and J.C. left her alone in the car." Instead, the statement showed that appellant remained at the scene of the crime for three to five minutes.

The State, during its direct examination of Bishop, demonstrated to the jury the length of a five minute period by having Bishop sit silently on the witness stand while the prosecutor let five minutes tick off of his watch. After this, the State allowed Bishop to reiterate that appellant never tried to leave the scene to get help from anyone.

The State also used appellant's statement during its case-in-chief to show how her post-offense behavior indicated her guilt. The State used the statement to place evidence of flight from the police before the jury. Specifically, during her account of the attempt to trade Dr. Booth's property to "Smiley" for drugs, appellant states that the police stopped "Smiley" in the victim's car in front of "Smiley's" house. In her statement, appellant recounted how she ran out the back door of "Smiley's" house and hid before returning to get the car keys back from "Smiley."

Appellant's statement was used in the State's examination of Bishop to point out several obvious falsehoods made by appellant. Toward the end of Bishop's testimony, the State questioned Bishop regarding appellant's oral comments. After her statement was written and signed, appellant told

Bishop that portions of her statement were not true. According to Bishop, appellant then told him:

> That she would tell the truth. Number one, she didn't want to get the death penalty; and, number two, if she was going to get the death penalty, that if she can get just one rock of cocaine, then she would tell the truth, but she wanted to get one rock of cocaine before she died.

The State then passed Bishop to appellant for cross-examination.

Lastly, the State relied extensively on appellant's statement during its closing arguments to the jury at guilt/innocence. Appellant's inadmissible statement became the rhetorical strawman that the State effectively decimated. The State made no less than ten references to appellant's statement in its arguments. The State referred to the statement as proof that it was appellant who called Dr. Booth on the morning of the murder. It pointed out in argument that appellant went to Dr. Booth's door to get sugar in order to get Dr. Booth to open her door. The State argued that it eliminated its first suspect, "Smiley," from suspicion in the murder of Dr. Booth because appellant explained in her statement that she allowed "Smiley" to borrow Dr. Booth's car for a few hours in exchange for drugs. The State used appellant's statement to remind the jury that appellant ran from the police at "Smiley's" *54 house "to avoid detection for this offense." The State pointed to appellant's statement as proof that appellant had possession of Dr. Booth's property and converted it to cash to buy drugs.

During its final closing argument in rebuttal, the State again relied on appellant's statement, citing it as direct evidence of her guilt. First, the State argued that "Kilo and J.C." existed only in appellant's statement. The State asked the jury if it made sense to it that "Kilo and J.C." would want property so badly that they would kill Dr. Booth, take her property, go to south Dallas, leave appellant with all of this stolen property, and walk away. The attorney for the State then argued before the jury,

> [STATE]: Now, let's assume just for the moment there was

this alleged Kilo and J.C. Let's assume that. Let me show you the ways you can find her guilty.

One, you can find her guilty as being the one who actually killed Ms. Booth and took her property.

Two, you can find her guilty as to what they call a party. If acting with intent to promote or assist in the commission of the offense, okay, she then solicits, encourages or aids J.C. and Kilo. In her own statement she called-- she called them, she aided them, she walked over there. It was because of her Ms. Booth opened the door and said, sure, you can find them as a party on that portion.

There is a third portion you can find her guilty for capital murder on. That's called a conspiracy theory. Okay?

What are we talking about when we talk about conspiracy.

Well if people conspire to commit one offense and another offense is committed by one of the conspirators actions, then all conspirators are guilty of the offense committed.

So even if you take her statement, okay, and she talks with them, that's conspiring with them about committing a robbery and she aids them, we know that, and either one of those alleged people goes in and kills Ms. Booth, then she can be convicted on conspiracy theory, theory number 3, okay, three ways you can convict.

The trial court instructed the jury on the law of parties and the law of conspiracy in the abstract. The trial court also instructed the jury on the law of parties in the second alternative application paragraph, and on the law of conspiracy on the third alternative application paragraph. Thus, the State used appellant's statement as direct evidence of her guilt as a party or co- conspirator.[FN7]

> FN7. Later in its closing argument, the State again used appellant's statement as further proof of her guilt as a party or co-conspirator: [STATE]: She waited outside the victim's house in a car for several minutes.

Here's a person whose life has been threatened and these friendly killers leave her outside in the car unguarded, doesn't go to the police, doesn't run for help, doesn't call anybody.

Does that make sense to you?

That's the first wait.

What about the second wait?

She waited outside while the alleged killers went in her house. Just wait. Let's wait for the killer. See?

Does that make any sense to you? You wait outside, doesn't run away, your life is supposed to be threatened?

No, it doesn't.

Three, the third wait. She waited in the car with the keys, we know, about a block off of Second Avenue for three to five minutes.

Folks, common sense that there was--if there was a real Kilo and J.C., you hang around knowing that these are the type of people that can kill and you just wait on them?

No, that's not true.

*55 The State also asked the jury to look to appellant's statement to find her motive for committing the capital murder of Dr. Booth.

[STATE]: On the TV you hear the words sometimes motive, means and opportunities. We are not required to prove motive, but I want to cover those with you to show how we put the facts of the together.

Motive, financial problems, wanted crack. We know that even from her own statement. Okay?

Lastly, the prosecutor used appellant's statement to help explain the murder weapon.

[STATE]: Think about this, Folks. In her statement--here's where the truth rings. In her statement she never ever mentions the knife. What did they

threaten her with if they did? Never mentions a knife. She never mentions them picking it up taking it out of the house. These are dope dealers. What did they need to get a knife for?

She never mentions them taking it back to her house. She never once mentions the knife.

Why?

Because the knife is what ties her into the crime.

[7] In analyzing whether the constitutionally erroneous admission of a defendant's statement was harmless, we look first to *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). In *Satterwhite*, the Supreme Court emphasized that the decision on harmlessness was not determined solely on the basis of whether there was sufficient evidence, independent of the defendant's inadmissible statement, for a reasonable jury to reach the same conclusion which it had reached with the statement.

The Court of Criminal Appeals thought that the admission of [the tainted] testimony on this critical issue was harmless because the "properly admitted evidence was such that the minds of the average jury would have found the State'scase (on future dangerousness) sufficient ... even if the testimony had not been admitted." The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

486 U.S. at 258-59, 108 S.Ct. 1792. The principle set out in *Satterwhite* still applies to this Court's review of harm in the admission of appellant's statement into evidence because this is federal constitutional error under Tex.R.App. P. 44.2(a). We must review whether the admission of appellant's statement contributed to the jury's verdict of guilty in this cause, regardless of whether there is evidence independent of the statement that is otherwise sufficient to sustain the jury's verdict of guilt.

[8][9] "An appellate court should not focus on the propriety of the outcome of the trial." *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex.Crim.App.2000). If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt. *See Satterwhite*, 486 U.S. at 256-257; *Wesbrook*, 29 S.W.3d at 119. The reviewing court should calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence. *See Wesbrook*, 29 S.W.3d at 119.

A defendant's statement, especially a statement implicating her in the commission of the charged offense, is unlike any ***56** other evidence that can be admitted against the defendant. *See Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). In *Fulminante*, the defendant was convicted through the use of a statement obtained in violation of his Fifth and Fourteenth Amendment rights. *See id.* at 287-88, 111 S.Ct. 1246. The Supreme Court noted that

> [A] defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

See id. at 296, 111 S.Ct. 1246.

In this case, appellant's statement did not place the murder weapon in her own hands, as the defendant's confession did in *Fulminante*. But her statement was, as the State's attorney so effectively pointed out in his closing argument, powerful enough to establish her guilt of capital murder either as a party or as a conspirator. It was also used to paint appellant as an unrepentant liar and set out her cruel and greedy motive for killing her elderly neighbor.

A confession is likely to leave an indelible impact on a jury. "If the jury believes that a defendant has admitted the

crime, it will doubtless be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence." *Fulminante*, 499 U.S. at 313, 111 S.Ct. 1246 (Kennedy, J., concurring).

Regardless of whether there was, apart from appellant's statement, sufficient evidence to conclude that the outcome of the trial was proper, we find it impossible to say there is no reasonable likelihood that the State's use of appellant's statement materially affected the jury's deliberations. *See Westbrook*, 29 S.W.3d at 119; *Garcia v. State*, 919 S.W.2d 370, 380 (Tex.Crim.App.1994). We cannot conclude, beyond a reasonable doubt, that the admission of appellant's unconstitutionally obtained statement did not contribute to the jury's verdict of guilty.

Although we are slow to overturn the verdict of a jury, when fundamental constitutional protections are violated, however innocently, we must uphold the integrity of that law. Accordingly, we sustain appellant's first point of error. [FN8] We reverse the judgment of the trial court and remand this cause to that court for a new trial.

FN8. Because we reverse the judgment on the basis of *Edwards* error, the other issues appellant raises are moot.

KELLER, P.J., filed a dissenting opinion in which HERVEY, J., joined.

KEASLER, J., not participating.

KELLER, P.J., filed a dissenting opinion in which HERVEY, J., joined.

If appellant's statement were truly a confession, in the sense that in it appellant admitted that she murdered Mrs. Booth, I would agree with the Court that its admission harmed appellant. Questions of harm and of the applicability of cases dealing with the improper admission of confessions are complicated, however, by the fact that when appellant gave her voluntary statement *57 to Detective Bishop, she meant it to be exculpatory. And it was

exculpatory. If the jury had believed what appellant said in her statement, the jury could have decided that appellant acted under duress on the morning of the murder and that she was not guilty of any crime at all. The introduction of the statement provided the jury with an option that did not exist in the absence of the statement.

In fact, and not surprisingly, appellant fashioned her defense around the statement. Max Courtney, director of a crime lab, testified that he was furnished photographs, witness statements, police statements, prosecution reports, autopsy reports, and more. From those items, he determined that nothing in the physical evidence at the murder scene was inconsistent with appellant's statement to Detective Bishop. Courtney further testified that the physical evidence at the murder scene appeared to be consistent with two different pairs of shoes leaving marks in the entryway, and with a bloody knife mark that did not match the knife found in appellant's house.

Because of the admission of appellant's statement, the trial court included in the jury charge an instruction on duress. Defense counsel was also able to argue duress to the jury, contending that appellant was coerced into helping Kilo and J.C. and that her statement was consistent with the evidence.

The defense of duress, and Max Courtney's testimony backing up the story in the statement, were available to appellant because her statement was admitted at trial. It is true that appellant was stuck with that particular defense once the statement was admitted, but she got the benefit of having the defensive theory she herself devised placed before the jury without having to testify. Moreover, if she had testified to facts inconsistent with the Kilo- J.C. duress story, the State could have introduced the statement to impeach her credibility. [FN1] Appellant's options became limited the moment she gave the statement, regardless of whether the State introduced it during its case-in-chief. The possibility of raising an actual defense other than duress was, to all intents and purposes, foreclosed by the State's ability to use appellant's statement for impeachment.

FN1. *Mincey v. Arizona*, 437 U.S. 385, 397-398, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975).

Setting aside consideration of the statement, there was abundant evidence that appellant killed Mrs. Booth. Appellant was seen driving Mrs. Booth's car within about an hour of the murder. Appellant pawned Mrs. Booth's ring that same day. Appellant used Mrs. Booth's credit cards several times and had the credit cards and Mrs. Booth's driver's license when arrested. Police found a large knife, cleaned but stained with Mrs. Booth's blood, in appellant's kitchen cabinet. The knife matched others found in appellant's kitchen.

The ultimate question is whether the admission of the statement contributed to appellant's conviction or punishment. [FN2] The Kilo-J.C. story offered an explanation for all of the above evidence, to one extent or another. Without the Kilo-J.C. story, there was no explanation.

And because the Kilo-J.C. story was available for impeachment purposes, appellant was limited in her ability to propose a different defense to the jury.

FN2. Tex.R.App. P. 44.2(a).

The evidence that fit least well with the Kilo-J.C. story was the evidence that was ***58** also, absent the story, most incriminating, namely: the knife. The appearance of what was apparently one of appellant's own knives, cleaned, in her kitchen cabinet, with the victim's blood under the handle, is consistent with the Kilo-J.C. story because according to the story, the two men were at appellant's house both before and after the murder. Counsel suggested in argument that the men took the knife and then after the murder put it in the cabinet to incriminate appellant. In the absence of the Kilo-J.C. story, there is no explanation at all for the presence of the bloody knife in appellant's kitchen cabinet. The Kilo-J.C. story offers an explanation for the other evidence, such as appellant's possession of Mrs. Booth's car, credit cards, and

ring. It may or may not be a very good explanation, and in fact the jury rejected it. But it was better than no explanation, which is what appellant had absent the admission of the statement.

The State used appellant's statement to argue that she was a liar. Showing a defendant to be a liar could establish harm. But in this case, the very same evidence that tended to show appellant was a liar was the evidence that tended to show she was a murderer. If the jury believed that the presence of the knife in appellant's kitchen, for instance, showed that appellant lied about Kilo and J.C., then the jury also believed that appellant had the murder weapon hidden in her kitchen cabinet, with no explanation for it being there.

The State also used appellant's statement to put her at Mrs. Booth's house the morning of the murder. But appellant's possession of the victim's car and other property shortly after the murder ties her to the murder anyway. Her statement at least attempted to explain that possession in a manner consistent with innocence. Absent the statement, there was no explanation. Her statement was buttressed by Max Courtney's testimony about two possible different shoe prints and a possible different knife, and supported by his claim that everything appellant said beginning with "I called my neighbor Dorothy Booth" to "both guys went back into my house and came out with my jam box, cordless phone and caller ID" was consistent with the physical evidence at the murder scene.

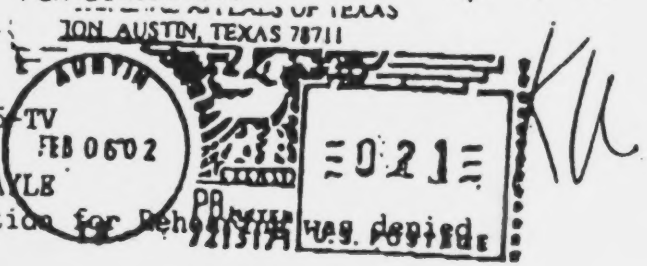
The State argued to the jury that it could find appellant guilty of capital murder even if it believed her story about Kilo and J.C., by convicting her as a party or as a conspirator. But that is not true unless the jury disbelieved the claim of duress.

Of course, the jury could believe one part of the statement and disbelieve other parts, but if the jury had believed all of it, appellant would have been acquitted. Even if the jury believed only part of the statement, appellant was still no worse off than she would have been with no defensive theory at all, or with whatever defensive theory counsel could suggest in argument.

Given the extremely damaging evidence against appellant, and the fact that the statement put before the jury appellant's explanation for the evidence and her claim of innocence, and the fact that making the statement limited her options regardless of whether it was introduced in the State's case-in-chief, I would hold that appellant was not harmed by the admission of the statement.

END OF DOCUMENT

P.O. BOX 12308, CAPITOL ... AUSTIN, TEXAS 78711



February 6, 2002
292ND DISTRICT COURT-F-9734795-TV
RE: Case No. 73,350
STYLE: MCCARTHY, KIMBERLY LAGAYLE
On this day the State's Motion for Rehearing was denied.

(JUDGE KEASLER NOT PARTICIPATING)

Troy C. Bennett, Jr., Clerk

BILL HILL
DISTRICT ATTORNEY
133 N INDUSTRIAL BLVD LB-19
DALLAS TX 75207

75207+4399

PS

APPENDIX B

APPENDIX C
(excerpt)

73350 ORAL ARGUMENT REQUESTED

NO. 73,350

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS AT AUSTIN, TEXAS

KIMBERLY LAGAYLE MCCARTHY,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

On appeal from the 292nd Judicial District Court
of Dallas County, Texas
in Cause Number F97-34795-TV

STATE'S BRIEF

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Criminal District Attorney
DALLAS COUNTY, TEXAS

LORI ORDIWAY
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ATTORNEYS FOR THE STATE OF TEXAS

FILED IN
COURT OF CRIMINAL APPEALS
AUG 2 8 2000
Troy C. Bennett, Jr., Clerk
ORIGINAL

In response to Points of Error Nos. 18 and 19, none of Appellant's points of error has merit individually, and thus they cannot have merit collectively, because the cumulative effect of no error is still no error.

Appellant received a fair trial which was free from reversible error. She has been afforded both federal due process and state due course of law. Appellant's conviction and death sentence should, in all things, be affirmed.

ARGUMENT

I.
THE TRIAL COURT DID NOT ERR BY ADMITTING APPELLANT'S WRITTEN STATEMENT INTO EVIDENCE; ALTERNATIVELY, ANY ERROR WAS HARMLESS.

Appellant claims that the trial court erred by admitting her statement, State's Exhibit No. P-14, into evidence, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The State responds that the trial court did not err by admitting Appellant's statement into evidence. Alternatively, any error was harmless because Appellant did not admit in her statement that she murdered the deceased, and the truthful facts in Appellant's statement were proven by the State's other evidence.

Relevant Facts

In a pretrial hearing, Dallas Police Detective Dwayne Bishop testified that Appellant's husband asked him to talk to Appellant. (RR45: 69). Detective Bishop knew Appellant's husband, the leader of the New Black Panthers, because the police had

monitored some of their demonstrations. (RR45: 74). Appellant's husband said he was going to kick in the doors of some drug houses until he could find the guys who Appellant claimed were with her at the time of this offense. (RR45: 69,74).

Detective Bishop talked to Appellant on July 29, 1997, while she was incarcerated in Lew Sterrett Jail. (RR45: 68-69). Detective Bishop told Appellant he was there because of her husband, to find out what was going on. (RR45: 79). Detective Bishop read the statutory warnings to Appellant, who indicated that she understood them and wanted to continue talking to Detective Bishop without an attorney. (RR45: 71-72). Detective Bishop first gave Appellant the statutory warnings and then explained that her husband had asked him to talk to her. (RR45: 86-87). Detective Bishop then had a conversation with Appellant, who told him she wanted to give a voluntary statement. (RR45: 72). Appellant gave Detective Bishop a voluntary statement, State's Exhibit No. P-14. (RR45: 70). Detective Bishop did not threaten Appellant, promise her anything, or coerce her into giving the statement. (RR45: 72-73,87).

Detective Bishop did not receive authorization from anyone in Lancaster or Dallas to go see Appellant; however, his supervisor said it was okay for him to talk with Appellant since it was just an interview. (RR45: 74-76). Before seeing Appellant, Detective Bishop talked to Detective Stallings of the Lancaster Police Department and said he was going to be talking with Appellant. (RR45: 74-75). Detective Stallings sent Detective Bishop a little synopsis of the case, but they did not talk about any particulars. (RR45: 84). Detective

Bishop wanted to get some idea of what the Lancaster police already knew, in order to verify whether Appellant was telling the truth. (RR45: 76). If Appellant was not telling the truth, Detective Bishop planned to tell Appellant's husband, "don't be going out there and ransacking, beating up guys just because of some description you have that's not true." (RR45: 76). Detective Bishop knew some of what Appellant said was not correct because the descriptions she gave of the two men involved varied from one time to the next. (RR45: 79,82-83). After talking with Appellant, Detective Bishop contacted her husband and told him what she had said. (RR45: 79-80).

Detective Bishop did not go to the jail with the intent to get a statement from Appellant, although he did intend to talk to her about the facts of the offense. (RR45: 77). After Appellant told him what happened, Detective Bishop procured a voluntary statement form, which is always available at the jail. (RR45: 77-79). Detective Bishop did not bring any recording device because he did not plan on taking a statement from Appellant. (RR45: 78). At the time Detective Bishop talked to Appellant, he did not know that Detective Stallings had talked to her or that she had exercised her right to counsel. (RR45: 86).

Lancaster Police Detective Stallings testified at the pretrial hearing that Detective Bishop called him the day before Bishop talked to Appellant and asked for some information on the case. (RR45: 91-92). Detective Stallings had already tried to interview Appellant. (RR45: 92). At first Appellant said she wanted to give a statement, but when Detective Stallings started to write it down, she invoked her right to counsel, and he stopped the

interview. (RR45: 92-93). Before Detective Bishop talked to Appellant, Detective Stallings told him that Appellant had invoked her right to counsel. (RR45: 93-94,96-97). It was Detective Stallings' understanding that Detective Bishop was going to talk to Appellant and try to get a statement from her. (RR45: 96).

During the guilt phase of trial, Detective Bishop testified that he went to Lew Sterrett Jail on July 29, 1997, to meet with Appellant at the request of her husband Aaron McCarthy. (RR48: 9-10). Detective Bishop read Appellant the Miranda warnings and she said she understood the warnings. (RR48: 11). Appellant waived her rights and freely and voluntarily agreed to talk to Detective Bishop. (RR48: 11). Detective Bishop asked Appellant to write down what happened on the day of the offense, and Appellant wrote a voluntary statement, State's Exhibit No. P-14, which was admitted into evidence. (RR48: 12-13).

In her statement, Appellant said that two men named Kilo and J.C. delivered drugs to her house at 1:30 a.m., stayed and partied with her until the drugs ran out, then asked her for more money, and threatened to harm her if she did not ask to borrow money from her neighbors. (RR48: 15-17). Appellant called Dorothy Booth twice and Booth answered the second call. (RR48: 17-18). Kilo told Appellant to ask to borrow sugar or milk, but Kilo and J.C. really planned to rob Booth and take her car. (RR48: 18). According to Appellant, when Booth opened her door, Kilo and J.C. knocked Booth down and shoved Appellant towards Booth's car, where Appellant stayed. (RR48: 19). Several minutes later the men

came outside with Booth's car keys, purse, and CD player. (RR48: 19). Appellant drove the men to a motel on Second Avenue, left them there, and then drove with all Booth's property to a dope house on Perry Avenue, where she gave "Smiley" the keys to the car and asked him to get dope for her. (RR48: 20). The police stopped Smiley in front of the dope house, and Appellant ran out the back of the house to get drugs elsewhere. (RR48: 20). After the drugs ran out, Appellant searched the purse and found a diamond ring and credit cards. (RR48: 20-21). Appellant pawned the ring and used the credit cards to buy cigarettes. (RR48: 21).

Appellant later told Detective Bishop that some of the things in the statement were not true. (RR48: 36). Appellant also told Detective Bishop that she did not want to get the death penalty, but if she was going to get the death penalty, she would tell the truth in exchange for one rock of cocaine before she died. (RR48: 39).

Detective Bishop testified that he did not go see Appellant as her friend or her husband's friend; he went as a police officer. (RR48: 33). Neither the Lancaster Police Department nor the Dallas Police Department asked Detective Bishop to visit Appellant. (RR48: 33-34). Detective Bishop was not assigned to Appellant's case, did not investigate the facts of this case, and did not work for the Lancaster Police Department. (RR48: 31,34-35).

Appellant argued at trial that she had invoked her right to counsel prior to the time she made any statement, so admission of the statement violated her Fifth Amendment

privilege. (RR45: 97). The trial court ruled that Appellant's statement was admissible. (RR45: 98).

Admission Of Statement Did Not Violate The Fifth Amendment

This Court has recognized that the right to counsel is not inherent within the Fifth Amendment, but is instead a prophylactic measure provided under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Dinkins v. State, 894 S.W.2d 330,351 (Tex. Crim. App. 1995), cert. denied, 516 U.S. 832 (1995), citing Davis v. United States, 512 U.S. 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The United States Supreme Court has determined that the prohibition against continued questioning after a suspect has invoked her right to counsel "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." Davis, 512 U.S. at 458, citing Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987). This prophylactic purpose is to protect a suspect who has already invoked her right to silence from being "badgered" into self-incrimination due to continued questioning by the police. Dinkins, 894 S.W.2d at 351, citing Davis, 512 U.S. at 458.

"Fifth Amendment counsel's primary function, therefore, is to provide a means and opportunity to prevent undue pressure to confess guilt." Holloway v. State, 780 S.W.2d 787,793 (Tex. Crim. App. 1989). The Fifth Amendment does not bar unwise confessions; it "bars only compulsory self-incrimination." Id. The promise of counsel can be waived because, in a Fifth Amendment context, "counsel's role is nothing more than an assurance

that if the suspect wants counsel, counsel will be made available." Id. "Miranda presupposes that information concerning the opportunity to consult with counsel protects against compulsion and safeguards the right to remain silent." Id. at 792. Thus, if the coercive pressures which might compel an accused to confess are not present, then the Fifth Amendment should not prohibit any person, even a police officer, from talking to an accused about the facts of a case.

Although Appellant had invoked her right to counsel when questioned by the Lancaster police, Dallas Police Detective Bishop went to see Appellant at the request of her husband, not at the request of the Lancaster Police Department or the Dallas Police Department. (RR45: 69,74,79; RR48: 9-10,33-34). This offense was a Lancaster Police Department case. (RR45: 74; RR48: 34). Appellant was arrested and questioned by the Lancaster police on July 24, 1997; Detective Bishop spoke to Appellant five days later on July 29, 1997. (RR45: 68-69,92; RR47: 60-62). Detective Bishop gave Appellant the warnings required by Miranda before talking to her. (RR45: 71-72). Detective Bishop talked to Appellant to learn the truth about the offense and verify if what she had told her husband was true. (RR45: 76,79). Detective Bishop told Appellant he was there to find out what was going on because of her husband. (RR45: 79). Detective Bishop did not plan on taking a statement from Appellant. (RR45: 77-78). Detective Bishop was not assigned to Appellant's case, did not investigate the facts of this case, and did not work for the Lancaster

Police Department. (RR48: 31,34-35). Thus, Detective Bishop was not acting as an agent for the Lancaster Police Department.

Not every contact with a police officer is a coercive contact, and Detective Bishop's contact with Appellant was not coercive in this case. Consequently, no purpose would be served by excluding Appellant's confession. Appellant was not badgered into giving the statement. Instead, Appellant gave her statement to a person who happened to be a police officer, who went to see her at the request of her husband, who did not intend to take her statement, and who was not assigned to the case or even working for the police department which had jurisdiction in the case.

In Corwin v. State, 870 S.W.2d 23,30 (Tex. Crim. App. 1993), cert. denied, 513 U.S. 826 (1994), the officer Mirandized the defendant and asked him whether he would make a formal statement, but the defendant declined to do so without first talking to an attorney; however, the defendant said that he wanted to get something off his chest and began talking about the murders. Days later, the defendant said he was ready to give a statement and, after being warned by a magistrate, he gave two written statements. Id. On appeal, the defendant claimed that these "involuntary" statements violated the Fifth Amendment. Id. at 31. This Court determined that the defendant's invocation of the right to counsel was limited to "formal" statements and, as long as that right was respected, "there was no Fifth Amendment barrier to further, otherwise voluntary, informal conversation" between the defendant and the police. Id. at 31-32. When the State proved that the defendant interjected a willingness

to make a formal statement during an informal conversation, the trial court reasonably concluded that the State met its burden to prove that "during a constitutionally permissible conversation with police [defendant] validly waived his right to counsel." Id. at 32. Thus, the defendant suffered no deprivation of his Fifth Amendment right to counsel.

In the instant case, Appellant similarly indicated a willingness to talk to Detective Bishop about the circumstances of the offense in an informal conversation, and then ultimately waived her right to counsel and gave a voluntary statement. Appellant likewise suffered no deprivation of her right to counsel.

This case is analogous to situations where the accused reinitiates contact with the police, since contact was reinitiated here at the request of Appellant's husband so he could take action to help her. In such situations, a statement taken from the accused is admissible. When a suspect invokes his right to counsel, all interrogation by the police must cease until counsel is provided or until the suspect himself re-initiates conversation. Minnick v. Mississippi, 498 U.S. 146,153, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); Edwards v. Arizona, 451 U.S. 477,484-485 101 S.Ct. 1880, 68 L.Ed.2d 378 (1980). Thus, "if suspects who have invoked their Miranda right to counsel initiate further communication and waive their Fifth Amendment rights, then resumption of interrogation without counsel is constitutional." Holloway, 780 S.W.2d at 789. This Court discussed reinitiation of conversation in Freeman v. State, 723 S.W.2d 727,732 (Tex. Crim. App. 1986), as follows:

> The rule set out in Edwards v. Arizona, supra, does not forbid all conversation between police and an accused. As the Supreme Court noted in

> Oregon v. Bradshaw, 462 U.S. at 1045, 103 S.Ct. at 2835, it is doubtful "that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, [and] there are undoubtedly situations where a bare inquiry by either a defendant or by police officer should not be held to 'initiate' any conversation or dialogue." The rule "is designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in Edwards was." Oregon v. Bradshaw, 462 U.S. at 1044, 103 S.Ct. at 2834.

In the instant case, Detective Bishop did not badger or coerce Appellant into giving her statement. The Fifth Amendment was not violated when Appellant gave this voluntary statement to Detective Bishop, who talked to Appellant at the request of her husband, not at the request of either the Lancaster Police Department or the Dallas Police Department. A suspect voluntarily confessing to a person who happens to be a police officer but who talks to the suspect on behalf of a family member does not violate the prohibition against continued questioning after a suspect invokes his right to counsel; therefore, the prohibition should not extend to such a case.

There was no coercive police conduct in this case. Appellant merely gave a statement to a person who talked to her at her husband's request. Detective Bishop was not trying to get information for the police, but was trying to learn the truth for Appellant's husband. Because the prohibition against continued questioning of a suspect who has invoked the right to counsel is not required by the Fifth Amendment's prohibition on coerced confessions, "but is instead justified only by reference to its prophylactic purpose," Davis, 512 U.S. at 458, the Fifth Amendment cannot be violated by a confession which was not the

result of coercive police conduct. Therefore, the trial court properly admitted Appellant's voluntary statement.

Any Error Was Harmless

Alternatively, if this Court determines that the trial court erred in admitting Appellant's statement, any error was harmless. The improper admission of an involuntary confession is "classic" trial error, which is subject to a harmless error analysis. Arizona v. Fulminante, 499 U.S. 279,309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Ex parte Fierro, 934 S.W.2d 370,374 (Tex. Crim. App. 1996), cert. denied, 521 U.S. 1122 (1997).

Without citing any authority, Appellant asserts that this is constitutional error "because the improper admission of an involuntary confession is a violation of the due process clause of the Fourteenth Amendment." (Appellant's brief at 32). This Court has not specifically addressed the issue, however, and the courts of appeals are split on whether improper admission of a written statement is constitutional or non-constitutional error.

The first task in deciding whether error in a criminal case is harmless is to determine whether the error is constitutional. Brown v. State, 960 S.W.2d 265, 271 (Tex. App. -- Corpus Christi 1997, no pet.). That is because TEX. R. APP. P. 44.2(a) governs constitutional error and provides that "the court of appeals must reverse . . . unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." For non-constitutional error, TEX. R. APP. P. 44.2(b) provides that "Any

APPENDIX D

73350

NO. 73,350

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS AT AUSTIN, TEXAS

KIMBERLY LAGAYLE MCCARTHY,
Appellant
vs.

THE STATE OF TEXAS,
Appellee

On appeal from the 292nd Judicial District Court
of Dallas County, Texas
in Cause Number F97-34795-TV

STATE'S MOTION FOR REHEARING

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REASON FOR REHEARING NO. 2 2

THIS COURT ERRED IN CONCLUDING THAT ADMISSION OF APPELLANT'S STATEMENT WAS HARMFUL ERROR.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas submits this Motion for Rehearing, urging this Court to reconsider its opinion of December 12, 2001, and would show the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

In its first reason for rehearing, the State asks this Court to address several significant issues that were not addressed in its original opinion on direct appeal. *See McCarthy v. State*, No. 73,350 (Tex. Crim. App. Dec. 12, 2001) (not yet reported). Oral argument would be beneficial to the Court because it would allow further discussion and exploration of these issues.

STATEMENT OF THE CASE

Appellant was convicted of capital murder by knowingly and intentionally causing the death of Dorothy Booth in the course of committing and attempting to commit robbery. (CR1: 2,64,81; RR49: 48). Appellant's death sentence was pronounced on November 24, 1998. (CR1: 81; RR53: 144-45). This case was submitted with oral argument on November 15, 2000. On December 12, 2001, this Court reversed the conviction and remanded this case to the trial court for a new trial.

REASONS FOR REHEARING

REASON FOR REHEARING NO. 1

THIS COURT SHOULD SPECIFICALLY ADDRESS WHETHER DETECTIVE BISHOP REINITIATED INTERROGATION WITH APPELLANT AS THOSE TERMS ARE CONTEMPLATED BY *EDWARDS V. ARIZONA*.

REASON FOR REHEARING NO. 2

THIS COURT ERRED IN CONCLUDING THAT ADMISSION OF APPELLANT'S STATEMENT WAS HARMFUL ERROR.

REASON FOR REHEARING NO. 1, RESTATED

THIS COURT SHOULD SPECIFICALLY ADDRESS WHETHER DETECTIVE BISHOP RE[illegible]TIATED INTERROGATION WITH APPELLANT AS THOSE TERMS ARE CONTEMPLATED BY *EDWARDS V. ARIZONA*.

In its opinion, this Court determined that the trial court erred in admitting Appellant's written statement into evidence because Appellant had invoked her right to counsel and had not reinitiated contact with the police. *McCarthy v. State*, No. 73,350, slip op. at 5-7 (Tex. Crim. App. Dec. 12, 2001) (not yet reported). In finding error, this Court cited *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), and stated that "[w]hen a person subjected to custodial interrogation unambiguously invokes the right to counsel, all questioning must cease. Interrogation may not be reinitiated by the police [footnote omitted] at any time or in any manner unless the person has consulted counsel. [Citation omitted.] Period." *McCarthy*, No. 73,350, slip op. at 7.

In reaching this decision, this Court has not considered that this case contains facts and raises questions that do not fit neatly into the bright line rule on which this Court relies in reversing this case. Thus, the State respectfully requests that this Court address more specifically the significant issues raised in this case, including: (1) whether Appellant's husband was acting as her agent (under actual or apparent authority) when he

asked Detective Bishop to meet with her; (2) even if Appellant's husband was not actually acting as her agent, did Appellant ratify her husband's actions when she talked (and gave a statement) to Detective Bishop; (3) whether Detective Bishop reinitiated interrogation under *Edwards*; and 4) even if Detective Bishop did reinitiate interrogation, whether a public safety exception should apply in this case.

The State urges that the facts in this case were in no way within the contemplation or foreseeability of the Supreme Court in *Edwards* when it announced the "bright line" no reinitiation rule. As the Supreme Court noted in *Dickerson v. United States*, 530 U.S. 428, 441,120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), "No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision." The issues in this case lie at the margins of the *Miranda* doctrine and the *Edwards* rule, and they need to be specifically addressed.

Relevant Facts

Appellant invoked her right to have an attorney on July 24, 1997. (RR45: 92; RR47: 60-62). The arresting and investigating agency, the Lancaster Police Department, stopped questioning her at that time, and Appellant was transferred to the Lew Sterrett Justice Center, the Dallas County jail. (RR45: 77,93).

Four days after Appellant invoked her right to counsel, Appellant's husband called Detective Bishop and asked him to go talk to Appellant. (RR45: 69,73-74). Detective Bishop was assigned to the intelligence division of the Dallas Police Department, not the

crimes against persons or homicide units. (RR45: 73). Appellant's husband was the leader of a group called the New Black Panthers, and the intelligence division of the Dallas Police Department monitored a lot of the New Black Panthers' demonstrations and other activities. (RR45:74). Appellant's husband told Detective Bishop that his wife had been arrested for a murder and that he and other members of the New Black Panther Party were going to "go out and try to find the guys that actually committed these murders." (RR45: 69). Detective Bishop went to talk to Appellant at her husband's behest. There is conflicting testimony as to whether Detective Bishop knew that Appellant had invoked her right to counsel. (RR45:86; 93-94, 96-97).

Detective Bishop testified that he did not plan on taking a statement from Appellant. (RR45: 77-78). He testified that he talked to Appellant "[t]o verify whether she was telling the truth" and "to find out what the facts were and then get back with Aaron," her husband. (RR45: 76, 80).

Bishop testified that he had the Dallas Sheriff's Office move Appellant from her jail cell to the intelligence room in the Lew Sterrett Justice Center. (RR45:77-78). At the outset of his meeting with Appellant, Detective Bishop read her *Miranda* warnings and explained to her that he was there "because of her husband" and that he "wanted to find out what's going on here . . . . " (RR45:79). Appellant agreed to talk to him and immediately began explaining her version of the events surrounding the offense.

Detective Bishop testified that he did not take any recording devices with him when he met with Appellant because "I wasn't planning on taking a statement from her. .

. . I was trying to get the facts." (RR45:78). When defense counsel asked Detective Bishop how he "just happen[ed]" to have a voluntary statement form with him, the detective replied, "[T]hey were already there at the [Lew Sterrett] justice center. The forms are already there." (RR45:77). He further explained that he found the voluntary statement form "[a]fter she told me what happened." (RR45:78-79).

Immediately after giving her statement to Detective Bishop, Appellant admitted to him that her written statement contained some lies. (RR48:36, 39). Furthermore, her statement was exculpatory on its face. Detective Bishop testified that he relayed what Appellant had told him to her husband. (RR45:80). The record is unclear as to when Detective Bishop contacted the investigating authorities or what information he gave them. (RR48:34, 37).

Analysis

1. *Appellant reinitiated contact with the police through her agent, her husband.*

In its majority opinion, this Court states that "[t]here is no evidence in this record that appellant herself affirmatively reinitiated conversations with law enforcement." *McCarthy*, No 73,350, slip op. at 6. This holding does not take into account the actions of Appellant's husband. Acknowledging that the State did not develop this argument as fully as it does here, the State respectfully requests that this Court revisit this holding in light of the following arguments and in the interest of justice. *See Boyle v. State*, 820 S.W.2d 122,141 (Tex. Crim. App. 1991) (this Court may exercise its discretion to address even new grounds on motion for rehearing "as justice requires" or "in the interest of

justice").

A suspect who has ended interrogation by requesting the assistance of counsel may himself reinitiate the interrogation before counsel has been provided. *Arizona v. Roberson*, 486 U.S. 675, 681 (1988). A suspect may reinitiate interrogation through the agency of a non-attorney third party. *See United States v. Gonzalez et. al*, 183 F.3d 1315, 1324 (11th Cir. 1999) (holding that the police did not reinitiate interrogation under *Edwards* after Gonzalez invoked his Sixth Amendment right to counsel where testimony showed that Gonzalez "reinitiated questioning—albeit through his agent, his wife."); *State v. Van Hook*, 530 N.E.2d 883, 39 Ohio St. 3d 256 (1988), *cert. denied*, 489 U.S. 110 (1989).

Under agency law, "The phrase 'power of an agent' denotes the ability of an agent or apparent agent to affect the legal relations of the principal in matters connected with the agency or apparent agency." RESTATEMENT (SECOND) OF AGENCY § 12 (1958). Absent actual or apparent authority, an agent cannot bind a principal. *Suarez v. Jordan*, 35 S.W.3d 268, 273 (Tex. App.—Houston [14th Dist.] 2000, no writ). Actual authority is authority that the principal intentionally conferred on the agent or allowed the agent to believe was conferred. *Suarez*, 35 S.W.3d at 273. The State submits that there is substantial circumstantial evidence in this case that Appellant's husband had actual authority to contact Detective Bishop on behalf of Appellant. *See Van Hook*, 530 N.E.2d at 887.

In the *Van Hook* case, Van Hook was arrested in Florida for committing a murder

in Cincinnati, Ohio. Van Hook told the police that he would voluntarily return to Cincinnati, and then he invoked his right to counsel. *Van Hook*, 530 N.E.2d at 883, 885. A few hours later, Detective Davis with the Cincinnati Police Department met with Van Hook in Florida to talk to him about his extradition. *Id.* at 885. During that conversation, Detective Davis told Van Hook that he had been in contact with Van Hook's mother and that "we had a lot to talk to him about." Detective Davis informed Van Hook that he could not talk to him unless he wanted to talk and make a statement. Van Hook replied that he, too, had spoken to his mother, that she had advised him to "just tell the truth," and that he wanted to make a statement, which he did. *Id.* at 885-86. The Ohio Supreme Court held that *Edwards v. Arizona* had not been violated because Van Hook's mother had acted as Van Hook's agent in reinitiating contact with the police.

The Ohio Court noted that, although there was no direct evidence that the mother had acted as an actual agent for her son (because the trial court erroneously excluded testimony regarding Detective Davis' conversations with the mother), "such content is *inferable* from the record . . . ." *Van Hook*, 530 N.E.2d at 887 (emphasis added). The Court explained that the record "made [it] clear that Van Hook had called his mother while he was in the custody of the Florida police," that Detective Davis had talked to Van Hook's mother *after* Van Hook had talked to her and *before* he met with Van Hook, and that Detective Davis "conceived **a belief** that appellant would *want* to talk to him because of what '[s]he [appellant's mother] had told me -- .'" *Id.* at 887 (emphasis in bold added, emphasis in italics in original).

In the instant case, as in *Van Hook*, there is no direct testimony that Appellant asked her husband to contact Detective Bishop. Indeed, neither side specifically asked that question of Detective Bishop. Just like in *Van Hook*, however, this Court can infer that Appellant talked to her husband *before* her husband contacted Detective Bishop because that is *the only way* her husband could have known Appellant's story that "some other guys" committed the offense. (RR45:69). At the time Appellant's husband talked to Detective Bishop, there would not have been any newspaper or television press on this aspect of the case. In her written statement, Appellant said that two men named Kilo and J.C. delivered drugs to her house at 1:30 a.m., stayed and partied with her until the drugs ran out, then asked her for more money, and threatened to harm her if she did not ask to borrow money from her neighbors. (RR48: 15-17). Five days *before* Appellant gave this statement, Appellant's husband told Detective Bishop that he and others "were going to go out and kick the doors in of some of these drug houses until they could find these guys that [were] with his wife at the time." (RR45:74). Thus, there is strong circumstantial evidence that Appellant told her husband the same story about the two drug dealers before she told Detective Bishop (and put it in her written statement).

Additionally, Detective Bishop's testimony suggests an almost eagerness on Appellant's part to tell her story; specifically, Detective Bishop testified, "I wanted to find out what's going on here . . . so she explained it." (RR45:79). He also testified, "Once she started explaining to me, I thought, well, wait a minute, there is a little bit more to this, and I started making notes as to what she was telling me." (RR45:79).

Moreover, just like in *Van Hook*, Detective Bishop would have reasonably assumed that Appellant's husband had Appellant's best interests at heart and that Appellant would *want* to talk to him. Thus, the fact that Appellant's husband had actual authority to act as her agent can be inferred from both the timing of the husband's request and Appellant's reaction to Detective Bishop.

Alternatively, if this Court concludes that Appellant's husband did not have actual authority, this Court should further apply agency law and conclude that Appellant's husband had apparent authority to ask Detective Bishop to visit Appellant. "Apparent authority exists when conduct by the principal leads a reasonable third party to believe that the agent has the authority that he purports to exercise." *Ebner v. First State Bank*, 27 S.W.3d 287, 300 (Tex. App. – Austin 2000, writ denied); *see Suarez*, 35 S.W.3d at 273 (holding that apparent authority is determined by looking to the acts of the principal and ascertaining whether those acts would lead a reasonably prudent person using diligence and discretion to suppose the agent had the authority to act on behalf of the principal).

In this case, Appellant acquiesced in talking to Detective Bishop after he read her the *Miranda* warnings and explained that her husband had sent him. Thus, Appellant's actions would have led Detective Bishop to reasonably suppose Appellant's husband had the authority to act on her behalf; therefore, viewed from Detective Bishop's standpoint, Appellant's husband had apparent authority to ask Detective Bishop to speak to his wife

about this case.[1]

In addition to establishing her husband's apparent authority, Appellant ratified her husband's actions by agreeing to talk to Detective Bishop, even though she was fully aware of her right to counsel and fully aware that her husband had sent the detective. Section 82 of the Restatement of Agency states, "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." RESTATEMENT (SECOND) OF AGENCY § 82 (1958); *see Household Credit Services, Inc. v. Driscol*, 989 S.W.2d 72, 87 (Tex. App. – El Paso 1998, writ denied) (explaining that the elements of ratification are: approval by act, word, or conduct; with full knowledge of the facts of the earlier act; and with the intention of giving validity to the earlier act). The Restatement of Agency also provides, "Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve. . . . . If there was clearly no authorization to do the acts, the

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[1] This Court has discussed the "apparent authority" doctrine as it relates to the Fourth Amendment consent to search issue. *See e.g. McNairy v. State*, 835 S.W.2d 101, 105 (Tex. Crim. App. 1991) (where, without formally adopting the doctrine, the Court found it useful to resolve the issues presented). Under this doctrine, a warrantless search pursuant to a third party's consent is valid if the facts available to the officer at the moment would warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. *Illinois v. Rodriquez*, 497 U.S. 177, 186-88 (1990); *Brimage v. State*, 918 S.W.2d 466, 480-81 (Tex. Crim. App. 1994).

A similar doctrine could be applied in this case in the context of the Fifth Amendment, whereby a third party could reinitiate interrogation on behalf of a suspect if the facts available to the officer would reasonably warrant his belief that the person had the authority to do so. For the reasons stated above, the facts in this case show that Detective Bishop could have reasonably believed that Appellant's husband had the authority to reinitiate contact with the police on Appellant's behalf.

acquiescence by the principal indicates an affirmance which normally operates as ratification. " RESTATEMENT (SECOND) OF AGENCY § 43 cmt a (1958).

In this case, ratification occurred when Detective Bishop told Appellant that her husband had sent him, and Appellant nonetheless agreed, not only to continue talking to Detective Bishop, but also to give a written statement.[2] Thus, even if this Court concludes that Appellant's husband was not acting under actual or apparent authority in asking Detective Bishop to speak with his wife, Appellant ratified her husband's act of sending Detective Bishop when she failed to repudiate it.

Accordingly, although Appellant initially invoked her right to counsel, she plainly reinitiated contact and interrogation through her husband who acted as her agent. There is extremely strong circumstantial evidence that Appellant likely asked her husband to talk to Detective Bishop. Regardless, even if Appellant did not authorize her husband to talk to Detective Bishop on her behalf, she clearly acquiesced in talking to Detective Bishop, conveying to him that her husband had apparent authority to act on her behalf, and ratified her husband's actions in any event by talking with the detective even after being completely aware that her husband had sent him. Under any of the above theories,

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[2] This ratification is conceptually similar to the evidentiary rule of "adoptive admission." *See* TEX. R. EVID. 801(e)(2)(B) (stating that a statement is not hearsay if it is offered against a party and is a statement of which the party has manifested his adoption or belief in its truth); *see Payne v. State*, 838 S.W.2d 668, 672 (Tex. App.—Dallas 1992, no pet) ("The theory underlying an admission by silence is that normal human reaction would be to deny such a statement if untrue."). As stated above, if Appellant felt that her husband did not have her best interest at heart, or if she simply did not want to talk to Detective Bishop, one would have expected her to have in some way distanced herself from her husband's apparent authority to act for her in reinitiating contact.

Appellant and/or her husband caused Detective Bishop to talk with Appellant, and their affirmative acts to bring about communications should not be imputed to the State under any *Miranda* or *Edwards* rationale.

2. *Detective Bishop Did Not Reinitiate Interrogation.*

In deciding that Appellant's statement was improperly admitted into evidence, this Court assumed that a police officer reinitiated interrogation of Appellant after she had invoked her right to counsel and relied on the "bright and firm constitutional rule" that interrogation may not be reinitiated by the police. *McCarthy*, No. 73,350, slip op. at 7. The facts in this case are so unusual, however, that the situation is not as simple as the Court's opinion suggests, and the State would respectfully request this Court to specifically address whether Detective Bishop reinitiated interrogation with Appellant as that term of art is contemplated by *Edwards v. Arizona*.

Numerous cases hold that *Miranda* is not implicated when a suspect in custody is questioned or encouraged to confess by a family member. *See Arizona v. Mauro*, 481 U.S. 520 (1987); *Whitehead v. Cowan*, 263 F.3d 708 (7th Cir. 2001) (extensively discussing *Mauro* and applying it to its case). In this case, Detective Bishop acted at the behest and on behalf of Appellant's husband; thus, he acted more in the capacity of a family member than as an agent of the state. Detective Bishop's actions in this case were wholly prompted by Appellant's husband's intervention; Detective Bishop's status as an officer merely afforded him access to act on behalf of the family. Therefore, his conversation with Appellant was not police initiated. *See United States v. Gaddy et. al.*,

894 F.2d 1307 (11th Cir. 1990); *Cook v. State*, 514 S.E.2d 657, 270 Ga. 820 (1999).

In the *Gaddy* case, William Danner was in jail with pending charges when his stepfather, James Gaddy, was arrested for violating parole. When the police confronted Gaddy with the fact that he had been driving a stolen car connected with a missing person, Gaddy said he got the car from Danner. Gaddy told the officers that he knew Danner's aunt, Janice Hernandez, a police officer with their department. The captain of the police department called the aunt into his office and told her about Gaddy's arrest and Danner's possible involvement with the stolen car and missing person. A while later, an investigating officer then approached the aunt and advised her that it would be in Danner's best interest to cooperate. 894 F.2d at 1309-10. Although the officer did not ask the aunt to talk to Danner, she sent a message to Danner to call the aunt, which he did. The aunt then urged Danner to reveal any information he had regarding Gaddy's arrest. Danner agreed, and the aunt notified officials that Danner wished to speak. Later that evening, Danner provided a detailed statement to the officers implicating himself and Gaddy in the abduction and murder of the missing person.

In analyzing Danner's Fifth Amendment claim and finding that no police-initiated interrogation occurred in violation of *Miranda* (or indeed *Edwards*), the Eleventh Circuit held:

> [H]ernandez communicated with Danner, not to assist the police department in solving a crime, but to protect her nephew.
>
> . . [Hernandez] acted as a private citizen, a concerned relative attempting to protect Danner from harm. Likewise, by encouraging Danner to tell the

> police what he knew, she acted as a worried aunt who envisioned the hardship that could befall her nephew if he did not reveal the information he possessed, especially before Gaddy rendered his version of the events to the police. The evidence shows that . . . even though she was a police officer [footnote omitted], her duties were not investigative in nature. She contacted Danner of her own accord, not at the direction of a superior and not for the benefit of the police department. . . . .

Gaddy, 894 F.3d at 1311.

In the instant case, Appellant's husband approached Detective Bishop out of concern for both his spouse and his community and asked him to talk to Appellant. Detective Bishop was not assigned to Appellant's case, did not investigate the facts of her case, and did not even work for the Lancaster Police Department. (RR48: 31, 34-35). Before talking to Appellant, Detective Bishop received nothing more than a synopsis of the case from the Lancaster Police Department. (RR45: 84). Although Detective Bishop testified he got permission from his supervisor to visit Appellant (RR45: 75), he further testified that his actions were not authorized by his department. (RR45: 80). Detective Bishop did not meet with Appellant to solve the charged offense, but rather to gather facts to pass on to Appellant's husband. Therefore, as in *Gaddy*, no police-initiated interrogation occurred in this case.

Likewise, *Cook v. State*, 514 S.E.2d 657, 270 Ga. 820 (1999), is instructive. After two murders had gone unsolved for almost two years, Cook became a suspect. 514 S.E.2d at 660-61. When a "GBI agent"[3] went to arrest Cook, he could not be found. The

[3] The Court did not define "GBI" in its opinion

agent then called Cook's father, FBI agent John Cook, and asked for his assistance in locating Cook so that they could question him about the unsolved murders. The father agreed to contact his son, but did not think he was involved in the murders. Cook admitted to his father that he had shot the victims in self-defense. When the father encouraged his son to go to the authorities, he said he was going to run and "just disappear."

The next day, Cook was arrested for illegally shooting game. When the investigating GBI agent discovered this, he went to talk to Cook. After the agent read Cook his *Miranda* warnings, Cook demanded his father and a lawyer. Subsequently, the police allowed the father to speak with his son. The father told his son he did not think his son had told him the truth on the phone, and Cook admitted to committing the murders for no reason. Cook's father testified that he "wanted to know what happened" and that, though it was difficult to separate out the law enforcement part of his personality, he wanted to speak to his son mostly as a father ("I was still not thinking in my mind directly and openly that I was an agent with the FBI"). He testified that he was not intent on gathering evidence for the State; instead, he wanted "to try to persuade Andy to cooperate in hopes of getting a reduced sentence." Cook's father further testified, however, that *he was not going to keep any incriminating evidence to himself and that he had no doubt he would pass on additional information to the investigators.* *Cook*, 514 S.E.2d at 663.

In discussing whether Cook's later statement to his father was admissible under

Miranda and *Edwards*, the Court noted that "this issue must be resolved on a case-by-case basis, by viewing the totality of the circumstances, in order to determine if the law enforcement parent was acting as a parent or as an agent of the State when speaking with his or her arrested child." *Id.* 664. In holding that John Cook acted as a father and not as an agent of the state when he met with his son, the Court relied on the following facts: (1) John Cook was not part of the investigative team on the murders (in fact, the FBI did not have jurisdiction to investigate the case); (2) Cook asked to see his father at the same time he requested an attorney; (3) the father was not directed by any law enforcement agent connected with Cook's case to speak to his son—he made the request on his own initiative; (4) the father's motive in speaking with his son was to urge him to cooperate in the hope of getting a plea bargain; and (5) the interview involved hugging and crying by father and son which is not typical of a police interrogation. *Id.* at 665.

Similarly, in the instant case, Detective Bishop was not part of the investigative team; he was approached by Appellant's husband; he was not directed by any law enforcement agent connected with the case to speak to Appellant; and Deteotive Bishop's motive in speaking to Appellant was to do a favor for Appellant's husband. Thus, as in *Cook*, Detective Bishop acted more in the capacity of a family member or agent than an agent of the State, and therefore, no police-initiated communication occurred.

In the alternative, if this Court concludes that Detective Bishop was acting in his official capacity as a police officer, the State submits that he did not reinitiate interrogation as viewed under *Miranda* and *Edwards* and their progeny. "As a general

principle, a mere inquiry into whether an accused has changed her mind about wanting to speak without an attorney present is not considered 'interrogation' within the meaning of *Edwards*." *Michigan v. Kowalski*, 584 N.W.2d 613, 620, 230 Mich. App. 464 (1998). "There are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983). Once Appellant's husband asked Detective Bishop to talk to his wife, Detective Bishop could have reasonably seen this as an indication that Appellant had changed her mind and wanted to reinitiate contact with the police.[4] *See Edwards v. Arizona*, 451 U.S. 477, 490 (1981) (Powell & Rehnquist, JJ., concurring) ("[P]olice legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney . . . Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision.")

In *Bunch v. Thompson*, 949 F.2d 1354 (4th Cir. 1991), after Bunch had been arrested and asserted his right to counsel, he was transported from Japan to Quantico, Virginia. *Bunch*, 949 F.2d at 1358. During his transport to the state police station in Quantico, an investigator asked him *"if he felt he was ready to sit down and go over the*

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[4] As this Court points out in its majority opinion, there is conflicting testimony as to whether Detective Bishop knew that Appellant had invoked her right to counsel. *McCarthy*, No. 73,350, slip. op. at 7. For purposes of this argument, we will assume that he knew because "[w]hether or not Stallings informed Bishop of appellant's invocation of her right to counsel is irrelevant because courts impute knowledge of the invocation of any *Miranda* rights to all representatives of the State." *McCarthy*, No. 73,350, slip op. at 7.

case." *Id.* (emphasis added). Bunch then confessed to the offense. *Id.* In holding that the lower court had properly concluded that *Miranda* had not been violated, the Court noted the lower court's finding that the investigator's inquiry "'amounted to nothing more than an effort to ascertain if Bunch had changed his mind about wanting an attorney and, hence, did not amount to police-initiated interrogation within the meaning of *Edwards*.'" *Id.* at 1361.

In the case at hand, Detective Bishop approached Appellant on her husband's behalf and revealed this to her at the outset. And, although Detective Bishop set up the meeting, the record suggests he did not expressly question Appellant, but merely told her he wanted to know what was going on. (RR45: 79—where Detective Bishop testified, "[I] explained to her why I was down there, because of her husband, and that I wanted to find out what's going on here and give me the whole story, so she explained it."). Because Appellant volunteered her story to Detective Bishop after his general statement of why he was there, she initiated communications under *Edwards*.

Moreover, the Supreme Court has explained that interrogation is defined as either explicit questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The Court defined "functional equivalent of express questioning" as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* In inquiring whether police actions are the functional

equivalent of express questioning, the Supreme Court has explained that the proper focus is "primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*

Detective Bishop did not expressly question (or the functional equivalent of expressly questioning) Appellant. He did not approach Appellant with the attitude or purpose of pressuring her to confess. He did not badger Appellant into giving an incriminating statement for the Lancaster Police Department. He was not trying to inculpate her in connection with the capital murder charge or any other charges. Instead, Detective Bishop was merely trying to help Appellant's husband and her by trying to figure out what was going on and to clarify the situation.

Additionally, nothing about the situation would have made Appellant feel compelled to talk—much less confess—to Detective Bishop. Viewed in the light most favorable to the verdict, there is strong circumstantial evidence both that Appellant's husband knew Appellant's story that "the drug dealers did it" *before* Appellant talked to Detective Bishop and that Appellant, at the outset, purposefully set all of the subsequent events into motion. Thus, Appellant would hardly have seen Detective Bishop's arrival as badgering.

Additionally, Detective Bishop told Appellant at the outset of their meeting that he was there due to her husband's request. Moreover, because Detective Bishop told Appellant he was there for her to "find out what's going on here" (RR45: 79), she could have reasonably presumed that Detective Bishop was not familiar with her case and therefore would not pressure her or question her about specifics (and in fact he was not

closely familiar with the details of the offense). Appellant obviously did not feel compelled to confess because she did not inculpate herself in the offense, and the statement she gave to Detective Bishop was exculpatory on its face. Appellant apparently took this opportunity to tell her self-serving version of how the offense occurred in order to promote her story and help herself. *See Oregon v. Elstad*, 470 U.S. 298, 305 (1985) ("'[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable',") (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). Appellant made an uncoerced decision to talk to Detective Bishop, and she should not now be heard to complain about that decision.[5]

3. *Safety Exception*

Alternatively, if this Court concludes that Detective Bishop was acting in his capacity as a police officer and that he did reinitiate interrogation with Appellant, then the State respectfully suggests that a public safety exception should apply to the *Edwards* rule, similar to the public safety exception to *Miranda* warnings as established in *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). In *Quarles*, the Court stated:

> Whatever the motivation of individual officers . . . we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its

[5] The evidence additionally shows that Appellant's written statement was the product of a knowing and voluntary waiver under the totality of the circumstances. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983) (citing *Edwards*, 451 U.S. at 486 n. 9) ("Since there was no violation of the *Edwards* rule in this case, the next inquiry was 'whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances . . . .'"

> rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

Id. at 656. The Supreme Court concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. In her concurrence, Judge O'Connor pointed out:

> Citizens in our society have a deeply rooted social obligation "to give whatever information they may have to aid in law enforcement." *Miranda v. Arizona*, 384 U.S., at 478 . . . . Except where a recognized exception applies, "the criminal defendant no less than any other citizen is obliged to assist the authorities."

Quarles, 467 U.S. at 665-66 (O'Connor, J., concurring in part and dissenting in part).

A public safety exception to the *Edwards* rule should be invoked in the instant case because Detective Bishop approached Appellant, in part, as an intelligence officer who was trying to protect the public safety and possibly prevent Appellant's husband and other New Black Panther members from taking the law into their own hands. Detective Bishop testified that Appellant's husband told him that "they were going to go out and kick the doors in of some of these drug houses until they could find these guys that he said was [sic] with his wife at the time." (RR45: 74). Detective Bishop additionally testified that "if she wasn't telling the truth, I was going to make sure I go back and tell her husband, you know, this is not the truth, don't be going out there and ransacking, beating up guys just because of some description that you have that's not true." (RR45:76).

Because Detective Bishop acted, in part, out of concern for the public safety when he went to visit Appellant, and because these unusual circumstances are not likely to recur regularly, this Court can carve out a public safety exception to the *Edwards* rule similar to the public safety exception to the *Miranda* rule.

Conclusion

In sum, the spirit of the *Edwards* bright line rule was simply not violated in this case. In *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990), the Supreme Court elaborated that "*Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." "The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick*, 498 U.S. at 151. And in *Arizona v. Mauro*, the United States Supreme Court opined:

> In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in Miranda and Edwards: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. The government actions in this case do not implicate this purpose in any way.

Mauro, 481 U.S. 520, 529-30 (1987).

In the instant case, there was no coercion or extraction of any kind. Instead, Detective Bishop went to Appellant at the request of her husband, who acted on Appellant's behalf. If her husband did not possess actual authority, he did possess apparent authority to act for Appellant. Furthermore, Detective Bishop did not "reinitiate" to obtain a confession in this case as that situation was envisioned by the

Supreme Court in *Edwards*. Rather he went to see Appellant after Appellant's husband told him the story about the potential unrelated violence from the other individuals. In sum, Detective Bishop acted reasonably and lawfully, the Federal Constitution does not forbid the use of Appellant's statement to him, and interpreting the case law to preclude it would serve no purpose other than to shut down legitimate and necessary investigation. For all these reasons, this Court should withdraw its opinion and hold that the statement was properly admitted.

REASON FOR REHEARING NO. 2, RESTATED

THIS COURT ERRED IN CONCLUDING THAT ADMISSION OF APPELLANT'S STATEMENT WAS HARMFUL ERROR.

In its opinion, this Court determined that the admission of Appellant's statement was harmful *McCarthy*, No. 73,350, slip op. at 14-15. Respectfully, this Court erred because Appellant's statement was much more exculpatory than inculpatory and allowed Appellant to present a defense without taking the stand, and because the truthful facts in Appellant's statement were proven by the State's other evidence.

TEX. R. APP. P. 44.2(a) governs constitutional error and provides that "the court of appeals must reverse . . . unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." When reviewing the harmlessness of admitting a defendant's statement into evidence, this Court follows the reasoning in *Satterwhite v. State*, 486 U.S. 249,258-59, 108 S.Ct. 1792, 100 L.Ed.2d 294 (1988), in which the question is not whether the evidence is sufficient to support the

verdict, but rather whether the State has proven beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *McCarthy*, No. 73,350, slip op. at 13.

In *Satterwhite*, the United States Supreme Court concluded that the use of psychiatrist Grigson's testimony at the capital sentencing proceeding on the issue of future dangerousness violated the Sixth Amendment because the right to counsel had attached and counsel was not given notice of the examination. 486 U.S. at 254-56. The Supreme Court further concluded that the error was harmful because the finding of future dangerousness was critical to the death sentence, Dr. Grigson was the only psychiatrist to testify on the issue, and the prosecution placed significant weight on his unequivocal testimony. *Id.* at 260.

By contrast, in the instant case, this Court can find beyond a reasonable doubt that admission of Appellant's statement did not contribute to the verdict because her guilt was amply proven by other evidence, Appellant (not the State) placed significant weight on the statement in lodging her defense, and the statement helped Appellant more than it harmed her by setting out her defensive theory without her having to testify. In her statement, Appellant denied going in Booth's house and claimed that J.C. and Kilo went inside and returned with Booth's property. If Appellant's statement had been believed, it explained how she came into possession of Booth's car, ring, and credit cards without any participation in the murder. As noted by Judge Keller in her dissent, if the jury had believed Appellant's statement, "the jury could have decided that appellant acted under

duress on the morning of the murder and that she was not guilty of the crime at all." *McCarthy v. State*, No. 73,350, slip op. at 1 (Tex. Crim. App. December 12, 2001) (Keller, P.J., dissenting) (not yet reported). Thus, the statement provided the jury with an option that did not exist at all in the absence of the statement. *Id.* at 1-2.

It is precisely because Appellant's statement was in evidence that she was able to present the defense of duress even though she did not testify. Without taking the stand and thereby risking impeachment by the State on cross-examination, Appellant was able to present her version of events through admission of her statement. This was a tremendous advantage to Appellant because she took no testimonial risk and still was able to have before the jury her explanation of some of the incriminating evidence, such as her possession of Booth's car and credit cards right after the murder. Appellant's only witness, Max Courtney, embraced Appellant's version of events by testifying that he saw two different footprints in the smeared blood, and that he did not find anything in the evidence that would be inconsistent with Appellant's statement. (RR48: 70,78). Without Appellant's statement in evidence, there would have been no basis for the testimony of Courtney, who was Appellant's **only** witness.

A juror would probably not place any weight on the statement because almost every incriminating detail in Appellant's confession was either directly or circumstantially proven by the State in other ways during the guilt phase of the trial. Appellant admitted in her statement that she called Booth and asked to borrow sugar. (RR48: 17). The State proved that Appellant had previously called Booth and asked to

borrow money, and also proved that sugar was spilled in the foyer of Booth's home. (RR46: 57-58,83,90). Although Appellant claimed in her statement that someone else went into Booth's house and took her property, Appellant admitted that she pawned Booth's ring and used Booth's credit cards. (RR48: 19-21). The State proved that Appellant pawned Booth's ring and used Booth's credit cards. (RR46: 180-84,186,188; RR47: 20-24,62-63,65,68-69). Appellant admitted in her statement that she drove Booth's car to a drug house. (RR48: 20). The State proved that Appellant drove Booth's car to a drug house. (RR46: 143,147,150-51).

Finally, Appellant admitted in the statement that she went to Booth's house but denied she went inside. (RR48: 19). The State proved that officers recovered a knife with Booth's blood on it from Appellant's kitchen cabinet above her refrigerator (RR47: 50,104), and thus circumstantially proved that Appellant went inside Booth's house and murdered Booth with the knife. The police found other knives of the same brand as the bloody knife in Appellant's kitchen drawers. (RR47: 48).

Although not a deciding factor, it is significant that there was sufficient evidence connecting Appellant to this murder even in the absence of her statement. In fact, this Court's opinion states that "the State offered ample evidence of appellant's guilt from sources independent of her statement." *McCarthy*, No. 73,350, slip op. at 7-8. The dissent also points out that, without considering the statement, there was abundant evidence that Appellant killed Booth. *McCarthy*, No. 73,350, slip op. at 3 (Keller, P.J., dissenting). The record shows that Appellant was Booth's neighbor and had previously

borrowed money from her in the middle of the night. The police recovered the knife used in the murder from Appellant's kitchen cabinet, and the knife was the same brand as Appellant's other knives. On the day of the murder, Appellant drove Booth's car and pawned Booth's ring. On the day after the murder, Appellant repeatedly used Booth's credit card. When she was arrested, Appellant was in possession of Booth's driver's license and several of her credit cards. The presence of overwhelming evidence of a defendant's guilt is a factor in the evaluation of harmless error under former Rule 81(b)(2) and current Rule 44.2 of the Rules of Appellate Procedure. *See, e.g., Moreno v. State*, 858 S.W.2d 453,466 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 966 (1993); *Orona v. State*, 791 S.W.2d 125,130 (Tex. Crim. App. 1990) (overwhelming evidence a factor under former Rule 81(b)(2) analysis)).

There was also overwhelming evidence supporting Appellant's death sentence. During punishment, the State presented DNA and fingerprint evidence showing that Appellant murdered two other elderly women in 1988; Appellant knew both women. (RR50: 90,98,102-3,114-15,120,122,143-47,151,154,156-57,161-63; RR51: 10-12,19,23-26,30-34). Appellant also had prior convictions for forgery and theft of services, and two prior convictions for prostitution. (RR51: 56-59-60). Additionally, Appellant had been a crack addict for many years. (RR51: 179-86).

This Court found that the error was not harmless because the State relied on Appellant's statement extensively during its case-in-chief and during closing arguments. *McCarthy*, No. 73,350, slip op. at 8. The Court reasoned that the State used the statement

to set up Appellant's version of what happened and then used the statement to discredit Appellant's version. *Id.* However, the statement, and testimony about the statement, was the only evidence of Appellant's version of events, and thus helped Appellant tremendously in setting up a defense. Since the State spent significant time and testimony discrediting Appellant's version of events, yet the statement allowed Appellant to present a defense, the statement should not be deemed harmful to Appellant.

This Court also noted that the State made significant use of the statement to establish Appellant's guilt. *McCarthy*, No. 73,350, slip op. at 9. However, although portions of Appellant's statement were used to show her guilt, those same portions that tied her to the offense also established her defense of duress if the jury believed that Kilo and J.C. were involved in the offense. The statement, as a whole, was much more exculpatory than inculpatory, and was given by Appellant because it was exculpatory.

This Court stated that the State used Appellant's statement to show how her post-offense behavior indicated her guilt because she ran out the back door of the crack house when the police stopped "Smiley" in the victim's car in front of the house. *McCarthy*, No. 73,350, slip op. at 9. However, most people would leave a crack house if they knew the police were in front of the house. Appellant leaving the crack house is not necessarily an indication of her guilt in the murder, and was just as likely to be seen by the jury as the logical move of someone in a place where illegal narcotics were sold.

This Court opined that the State relied extensively on the statement during closing arguments by using it as a "rhetorical strawman that the State effectively decimated."

McCarthy, No. 73,350, slip op. at 10. The fact that the prosecutors spent their argument "decimating" the statement, rather than relying on it, shows that the statement was much more helpful than harmful to Appellant. Indeed, if the jury followed the prosecutors' arguments, the jury would not have considered the statement at all.

This Court noted that the State used the statement as direct evidence of Appellant's guilt as a party or a co-conspirator. *McCarthy*, No. 73,350, slip op. at 10-12. While the State made an alternative argument about Appellant's guilt as a party or conspirator (RR49: 39-40), the State spent much more time and energy discrediting the participation of, and even the existence of, Kilo and J.C. Without Kilo and J.C. committing the murder, Appellant could not have been a party or a conspirator to their offense.

This Court reasoned that the State's argument referred the jury to Appellant's statement to find her motive for the murder. *McCarthy*, No. 73,350, slip op. at 12. The prosecutor argued, "Motive, financial problems, wanted crack. We know that even from her own statement." (RR49: 40). However, even without reference to the statement, the State proved Appellant's desire for crack and for money. The State proved that Appellant drove Booth's car, pawned her ring, and used her credit cards right after the murder. (RR46:143,147,150-51,180-84,186,188; RR47:20-24,62-63,65,68-69). Appellant's desire to use Booth's property was sufficient motive for the murder, and was proven without reference to the statement.

Finally, this Court reasoned that the prosecutor used the statement to help explain Appellant's possession of the murder weapon by arguing that she never mentioned a knife because it tied her to the murder. *McCarthy*, No. 73,350, slip op. at 12. Rather than "using" the statement in this instance, however, the prosecutor again discredited it. It definitely favored Appellant that her statement never referred to the knife since, if Kilo and J.C. committed the murder while she was outside in the car, Appellant would not have known about the knife.

In fact, the statement was even useful to Appellant in explaining aspects of the case that were not mentioned in the statement, such as the presence of the knife with Booth's blood on it, which was found in Appellant's kitchen. According to Appellant's statement, Kilo and J.C. were at her house both before and after the murder. (RR48: 16,20). As noted by Judge Keller in her dissent, in the absence of the Kilo-J.C. story, there is no explanation at all for the presence of this knife in Appellant's kitchen. *McCarthy*, No. 73,350, slip op. at 3 (Keller, P.J., dissenting). With the Kilo-J.C. story, presented only through Appellant's statement, there was at least an explanation from the defense for the knife's presence in Appellant's kitchen after the murder. Without the statement, Appellant has no explanation, other than her own participation in the murder, for the bloody knife being in her kitchen.

Although the statement put Appellant at Booth's house the morning of the murder, Appellant's possession of Booth's car and credit cards very shortly after the murder ties her to the murder anyway. As Judge Keller noted, Appellant's statement at least

attempted to explain her possession of Booth's property in a manner consistent with innocence. *McCarthy*, No. 73,350, slip op. at 4 (Keller, P.J., dissenting). Without the statement, Appellant has no explanation, other than her own participation in the murder, for her possession of Booth's property.

This Court cites *Fulminante v. Arizona*, 499 U.S. 279,296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) for the reasoning that a defendant's statement, especially one implicating her in the offense, is unlike any other evidence that can be admitted. *McCarthy*, No. 73,350, slip op. 14. While this is certainly true in a situation where the statement truly implicates a defendant, this statement in the instant case does not. According to Appellant's statement, she was forced by Kilo and J.C. to make a phone call to get Booth to open her door, and then she was made to wait in the car while they committed the capital murder. (RR48: 15-19). At its worst, the statement puts Appellant at Booth's house the morning of the murder and allows Appellant to be considered a party to the offense, but only if Appellant's claim of duress were not believed. If Appellant's claim of duress were believed, then she would not be guilty of the murder at all. Thus, unlike the confession in *Fulminante*, in which the defendant admitted his personal commission of the sexual assault and murder, 499 U.S. at 283, Appellant's statement is no "confession" at all, but instead a clever story designed to place the blame on someone else, cast Appellant as someone forced to help the killers, and thus give reasons for her possession of Booth's property and for any incriminating evidence found in her house.

In sum, the statement was not a confession, so *Fulminante* does not apply. Moreover, the other evidence in this case, including the evidence which independently proved almost every truthful admission in Appellant's statement, the murder weapon found hidden in Appellant's house, and Appellant's possession of the victim's property after the murder, overwhelmingly supports the verdict. The statement put before the jury Appellant's explanation for most of the incriminating evidence as well as her claim of duress. Finally, and a fact which should not be overlooked, almost all the State's references to the statement during testimony and argument were efforts to discredit it. Indeed, excising the inadmissible statement "does not render the State's case any less persuasive," so any error was harmless. *Stinnett v. State*, 720 S.W.2d 663,668 (Tex. App. – Amarillo 1986, no pet.). Therefore, this Court can conclude beyond a reasonable doubt that it did not contribute to the conviction or the punishment, and that its admission was clearly harmless. *See Hicks v. State*, 860 S.W.2d 419,430-31 (Tex. Crim. App. 1993), *cert. denied*, 512 U.S. 1227 (1994) (confession obtained in violation of Fifth Amendment right to counsel was harmless in view of admission of substantively the same evidence); *Beck v. State*, 712 S.W.2d 745,748-49 (Tex. Crim. App. 1986) (confession obtained in violation of right to counsel was harmless). The State respectfully requests that this Court grant its Motion for Rehearing and affirm Appellant's conviction.

CONCLUSION

The State prays that this Honorable Court grant the instant Motion for Rehearing, reconsider the opinion of December 12, 2001, and, upon rehearing, affirm the conviction rendered in the trial court below.

Respectfully submitted,

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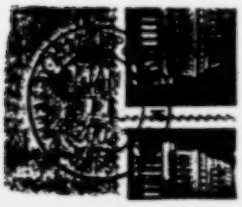
CERTIFICATE OF SERVICE

I certify that a copy of this Brief has been served on Douglas H. Parks, Attorney for Appellant, 3300 Oak Lawn, Suite 600, Dallas, Texas 75219, by depositing same in the United States mail, postage prepaid on the 11th day of January, 2002.

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